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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF
WILLIAM J. BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

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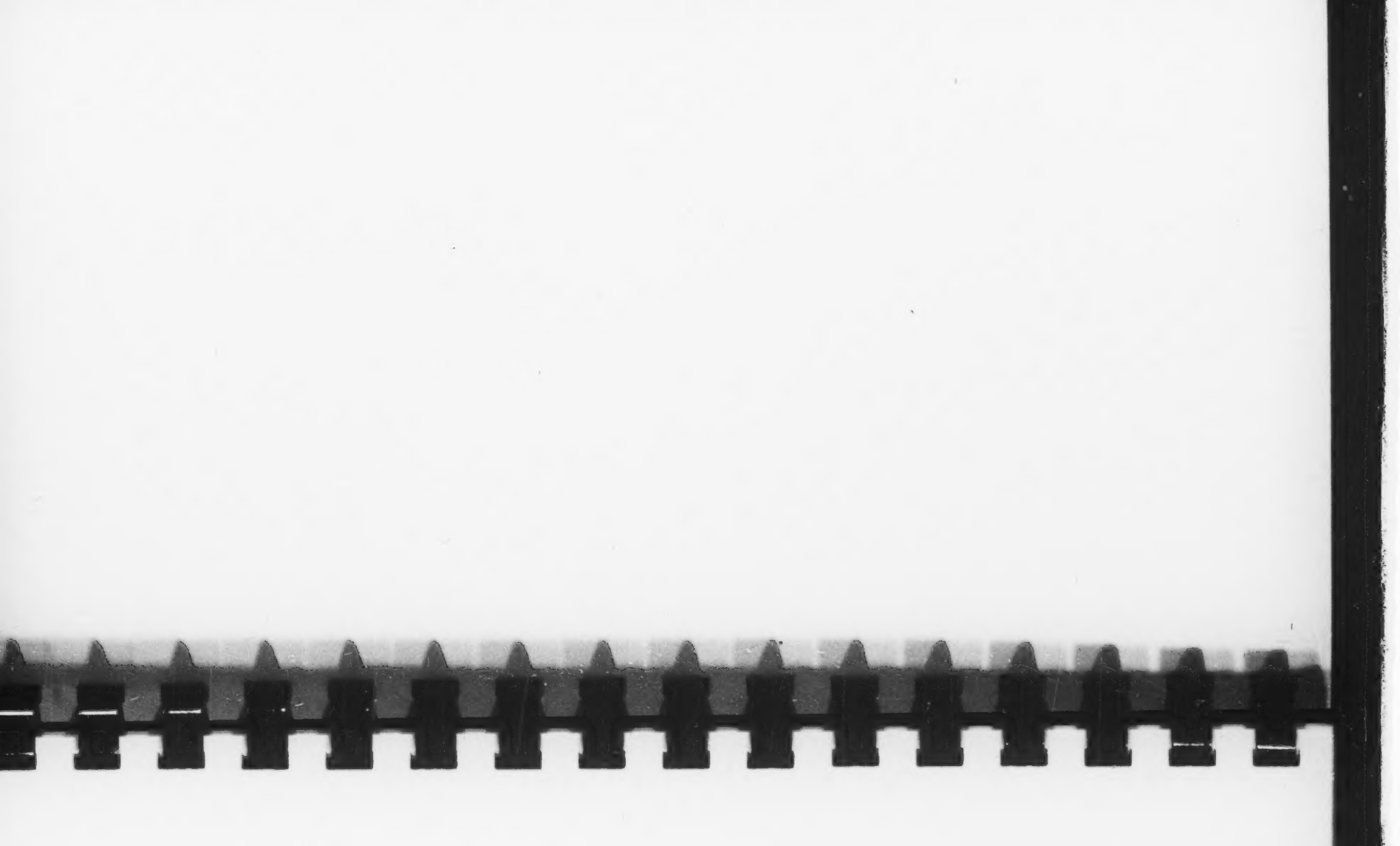

QUESTIONS PRESENTED

1. What constitutional rights do attorneys have in Disciplinary Actions?

2. Whether the right to speedy trial under 6th Amendment and due process protection against delay under 5th and 14th Amendments must be provided in disciplinary proceedings? And if so to what extent?

3. Whether exercising diligence to prevent delay in prosecution of disciplinary actions untimately rests with State or accused?

4. Whether unjust delay in prosecution of a disciplinary action supports dismissal of charges or mitigation of punishment? And if so, whether this case should be dismissed or punishment mitigated?

5. Whether a long delay grossly in excess of 60 day time limitation for holding hearing under Indiana Disciplinary Rule 23, Section 13 violated the rules by delaying so far beyond the scope of authority that due process was denied and the court lost jurisdiction?

6a. Whether right to redress for grievance includes right to raise constitutional issues by pre-trial motions?

6b. Whether right to redress for grievance for constitutional issues includes right to pre-trial hearing or right to bifurcated trial hearing?

7. Whether requiring Petitioner to proceed to trial in this case:

(a) denied right to speedy trial, fair trial, meaningful opportunity to be heard, right to timely redress for constitutional guarantees and constituted fundamental error resulting in denial of due process of law as guaranteed by Amendments 5 and 14 and denial of right to redress under Amendment 1, under U.S. Constitution,

(b) posed so many threats to constitutional rights that they could not be eliminated by presentation as defenses at the trial,

(c) denied due process of law and equal protection under 5th and 14th Amendments because delay produced loss of evidence and denied right to an adequate record which denied effective judicial review on appeal as guaranteed to others?

8. Whether processing this disciplinary proceeding over a ten year period resulted in such excessive punishment and irreparable harm that it falls within the prohibitions for cruel and unusual punishment protected under Amendment 8 to the U.S. Constitution?

LIST OF PARTIES

The parties below are as follows: (1) William J. Briggs, Petitioner herein, Respondent below, (2) The Disciplinary Commission of the Indiana Supreme Court, as an arm of that Court, which filed the Disciplinary Complaint against the Petitioner herein, (3) The Attorney General of the State of Indiana is being served with copies of the Petition for Writ of Certiorari.

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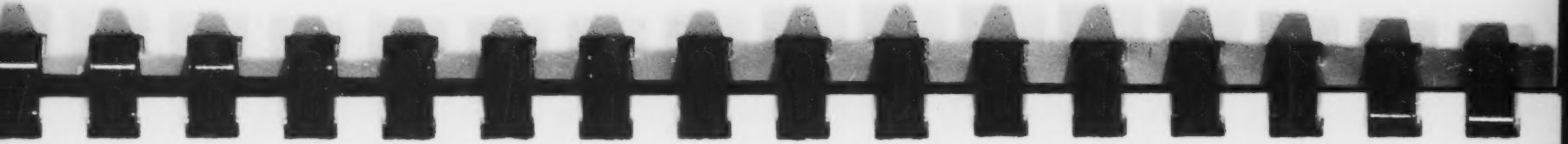

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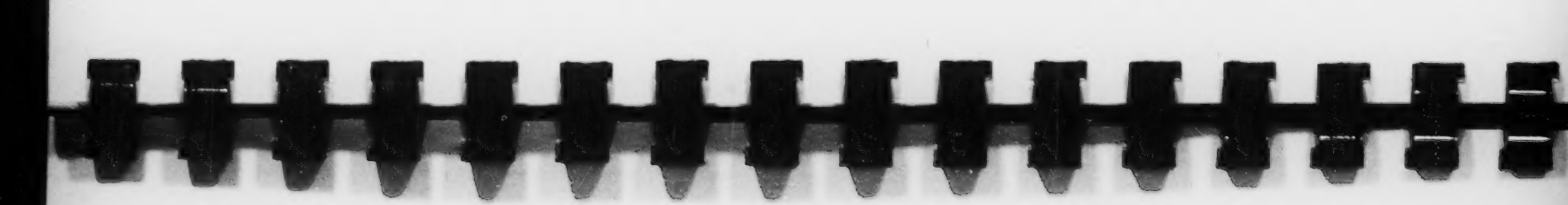

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No.

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IN THE MATTER OF
WILLIAM J. BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

William J. Briggs, pro se respectfully petitions for writ of certiorari to review the judgment of the Supreme Court of Indiana entered in the above proceeding on January 13, 1987.

DECISIONS BELOW

The judgment of the Supreme Court of Indiana (is included in App.B) is reported at 502 N.E.2d 879. The report of the hearing officer (is included in App.C) is not expected to be reported.

JURISDICTION

The judgment of the Indiana Supreme

Court (App.B) was entered on January 13, 1987. A petition for temporary stay (App.E) was denied on February 12, 1987. A joint Petition For Modification of the judgment (to reduce suspension time and/or to have suspensions served sequentially rather than concurrently) (App.E) was denied on February 25, 1987. On April 6, 1987, Justice John Paul Stevens extended the time within which to file a petition for writ of certiorari to June 12, 1987. The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3).

CONSTITUTIONS, COURT RULES,

The following Amendments to the United States Constitution provide in relevant part:

1st Amendment

> Congress shall make no law ... abridging the right ... to petition ... for a redress of grievances.

5th Amendment

> No person shall ... be deprived of life, liberty or property, without due process of law....

6th Amendment

> ...the accused shall enjoy the right to a speedy ... trial, ...

8th Amendment

> ....nor cruel and unusual punishment inflicted.

14th Amendment

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny...equal protection...

Article 7 Sec. 4, Indiana Constitution

> The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted....

Indiana disciplinary rule AD 23 provides in relevant part:

> R.A.D 23, Sec. 13
>
> ...hearing officers shall have the power and duty to:
> (a) Conduct a hearing on a complaint of misconduct within sixty (60) days after the

hearing officer is appointed and has qualified;

(b) Receive evidence and make written findings of fact and recommendations to the court;

R.A.D. 23, Sec. 14(a)

(a) The rules of pleading and practice in civil cases shall not apply. No motion to dismiss or dilatory motions shall be entertained...

R.A.D. 23, Sec. 14 (e)(f)

(e) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

(f) ...hearing officers shall determine whether misconduct has been proven...and shall submit to the Supreme Court written findings of fact. Recommendations concerning the disposition of the case may be made by the hearing officer in discretion.

R.A.D. 23, Sec. 15 (a)

(a) The respondent or Commission shall have thirty (30) days after the filing of the hearing officer's finding and recommendation to petition for review of the same before the Supreme Court. If no petition for review is filed within thirty (30) days of the finding and recommendation of

the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

STATEMENT OF THE CASE

Nature of case: This Disciplinary Action grew out of a grievance initiated by two lawyers associated with a former client of Petitioner. Simultaneously in July, of 1977, they filed a grievance and commenced civil litigation which has been highly profitable to the lawyers. The grievance grew out of a long historical background of friendship and legal services to the former client commencing about 1965. Some of the second Amended Complaint (not filed until 1983) proceeded upon the theory of violations of the old pre-1970 American Bar Association Canons. (App.A-6, and App.C-86).

Course of Proceedings: The deposition of the former client, Mary Bernice Smoker, was taken in late 1977.

In October, 1978, the complaint was filed, the first hearing officer was appointed, and in November, 1978, the Petitioner answered the Complaint. The docket sheet reflects no action by the Disciplinary Commission for the next 30 months until after the death on August 31, 1981 of the first hearing officer. No hearing was ever held by the first hearing officer. The officer who finally heard the case was not appointed until 6 months later on February 24, 1982. The former client, Mary Bernice Smoker, died in November of 1979. The second Amended Complaint was not filed until July of 1983, which was 16 months later, although it was authorized by Disciplinary Commission members in July of 1982. The Commission denied responsibility for long delays by alleging heavy work load and scheduling problems. The Commission's attempt to blame Petitioner for delay was based on the

theory that James Stewart, former attorney for Briggs, had agreed to an informal postponement of disciplinary proceedings pending the outcome of civil litigation. The disciplinary trial was delayed until July, 1984, at which time James Stewart, attorney for Briggs, was deceased. All civil litigation ended in 1980, and the Disciplinary Commission did not file its Amended Complaint until July, 1983, about 30 months later which was very shortly after the death of attorney James Stewart. The third amended complaint was not filed until June of 1984, about 30 days before the trial commenced in July of 1984.

No pleadings were filed by either the Disciplinary Commission or the Petitioner requesting that the proceedings be expedited. It was about 7 years from the grievance in July, 1977 until the trial in 1984. The Hearing Officer's Report was

filed in January, 1985. Two years later in January, 1987, the judgment of suspension was entered. It took 10 years to process this case form grievance to judgment.

Raising of Constitutional Issues: About August 19, 1983, Petitioner filed his response to the second Amended Complaint filed July, 1983. By his response, Petitioner raised numerous constitutional issues including those which are presented in this petition.

On or about May 7, 1984, Petitioner filed an extensive petition -- **PRESENTATION OF CONSTITUTIONAL ISSUES AND ERRORS -- PETITION FOR HEARING, ORAL ARGUMENT.** (App.F). This pleading gave notice that Petitioner's constitutional protections could not be eliminated by a hearing on the merits. The Petitioner requested a pre-trial hearing, an opportunity to present evidence and oral

argument. This pleading was filed with Hearing Officer Morton as well as the Indiana Supreme Court. About 30 days later on June 4, 1984, before the hearing on the merits, the Indiana Supreme Court entered a cursory Order denying the May 7th pleading. (App.F-34). It denied oral argument, right to present evidence, oral argument and a separate hearing on constitutional protections although the pleading specifically requested a separate hearing to satisfy right to redress under the 1st Amendment. (App.F-4).

In a memorandum with supporting affidavits attached to the May 7, 1984 pleading, Petitioner filed an affidavit showing that at least 23 witnesses were dead or unavailable for trial. Eventually several others were unavailable and most others, including the Commission's Executive Secretary, professed lack of recall for facts so long ago. By an

Affidavit of Events, Petitioner showed the long history of this case including the delay.

The Indiana Supreme Court refused to acknowledge the existence of constitutional problems. Petitioner was required to proceed to trial and was forced to sandwich-in his numerous and complex constitutional objections during a lengthy trial, already complicated by complex issues and the court overruling Petitioner's objection, to being tried jointly with his wife. (App.G).

Result Below: The trial was completed before Hearing Officer Morton who rendered his report in January, 1985. The hearing officer stated in his report (App.C-147) "[Respondent's]...background of years of services to the Carroll County Bar must be weighed in his favor; while he lost his perspective in this one matter, he would appear to be a minimal risk to

the public." The hearing officer recommended in his report (App.C-147) a 6 month suspension for William J. Briggs. The Supreme Court of Indiana in rendering its judgment of January 1987, increased the punishment for Florence Anne Briggs from a reprimand to "not less than one year suspension" and increased the punishment for William J. Briggs from 6 months to a two year suspension. (App.B-46) Both suspensions began at the same time on February 16, 1987. Petitioner filed on January 29, 1987, (App.E-1) Petition for a Temporary Stay of Court's decision which was denied by Order entered February 12, 1987. (App.E-9). Petitioner filed on February 2, 1987, (App.E-11) Petition For Modification of Court's decision which was denied by Order entered on February 25, 1987. (App.E-16). The joint suspension harshly closed the law office door of William J. Briggs and

Florence Anne Briggs on almost 29 years of law practice and left this family without means of support or sustenance. Additional background is found in the report of the hearing officer and Parts F, G, and H of this Petition.

REASONS FOR GRANTING THE WRIT

WHAT 5TH AND 6TH AMENDMENT RIGHTS DO ATTORNEYS HAVE IN DISCIPLINARY ACTIONS?

Part A

SUMMARY OF PROBLEM

Although it is generally agreed that disciplinary proceedings against attorneys are "quasi-criminal" in nature, In re Ruffalo, 340 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), there is much disparity among Circuits and States as to

what constitutional rights attach to those proceedings by virtue of that status. Conceding that many courts view the primary purpose of disciplinary proceedings to be the protection of the public, see e.g., In re Weinstein, 254 Or. 392, 394, 459 P.2d 548, 549 (1969), cert. den., 398 U.S. 903, 90 S.Ct. 1689, 26 L.Ed.2d 61 (1970), however, because disbarment and suspension are punishments which deprive the individual of valuable property rights, it is well-established that attorneys are entitled to some form of procedural due process during these proceedings. Ruffalo, supra. The question presented here is: what is the scope of the process that is due attorneys? While notice and opportunity to be heard are clearly included within such due process, Circuits and States vary as to the meaning of these terms as well as to whether other protections are due.

This Court should grant certiorari to clear up these issues by defining what rights attach to quasi-criminal disciplinary proceedings which potentially deprive individuals of their livelihoods. While attorneys, from their earliest law school courses, are trained to recognize what rights potential clients may rely on, under current law, attorneys themselves are uncertain as to which rights they possess when accused of wrongdoings in disciplinary actions. This important issue should now be addressed by this Court so that others in Petitioner's position will be able to turn to an organized body of case law to determine how to protect their interests which a State seeks to deprive.

Part B

DECISIONS DIVIDED -- CLARIFICATION NEEDED
NO BODY OF LAW

Decisions are Divided -- No Body of Law -- States and Circuits are Confused as to Which Law and What Process is Due in

Disciplinary Proceedings -- Clarification Needed -- Confusion and Lack of Body of Law Encourages Arbitrary and sui generis Decisions and Denial of Constitutional Rights.

State disciplinary and disbarment proceedings are comparable to criminal proceedings, see Person v. Ass'n of Bar of City of New York, 554 F.2d 534, 536 (2d Cir. 1977), because they have consequences which remove them from the ordinary run of civil cases. In both criminal and disciplinary proceedings the accused is subject to punishment. See Matter of Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975). Because disbarment means deprivation of livelihood, see Steadman v. S.E.C, 603 F.2d 1126, 1138 (5th Cir. 1979) "[i]t is only fair and just that the government not subject any person to such drastic divestment [of livelihood] without affording him substantial due process of law. In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972) (emphasis added).

> [I]n view of the gravity of the punishment of [disciplinary proceedings] ... which includes stiff fines, or even suspension or disbarment with all the consequential damage which that entails, the test that must be employed as to the constitutionality of the disciplinary machinery to be used must be a very severe one. In re Bithoney, 486 F.2d 319, 323 (1st Cir. 1973) (emphasis added).

Due to the potentially severe punishments involved, Petitioner advocates the view of Justice Black, Justice Douglas and the 1st Circuit that courts should use the "strictest possible due process standards for the procedures used to carry out necessary bar discipline." Id; see also Law Students Civil Rts. Res. Coun., Inc. v. Wadmond, 401 U.S. 154, 174, 91 S.Ct. 720, (1971) (Black J. dissenting).

Courts vary as to whether even minimal process is due. For example, while the 4th Circuit holds that procedural due process in a disbarment proceeding does not require that a hearing

be given to the attorney involved, see In re Chipley, 448 F.2d 1234, 1235 (4th Cir. 1971), the 5th Circuit holds that the minimum protections of due process in such proceedings include a hearing. Steadman v. S.E.C., 603 F.2d 1126, 1138 (5th Cir. 1979). Although the 5th Circuit holds that due process in disciplinary proceedings includes the right not to testify against oneself, Id., the 7th Circuit holds that the right against self-incrimination is not applicable in disciplinary proceedings. See In re Daily, 549 F.2d 469 (7th Cir. 1977). Even the standard of proof that is required in such proceedings is confused as many jurisdictions use a preponderance standard while other jurisdictions use a higher standard. See 7 C.J.S. Attorney & Client Sec. 33a(3) (1937 & Supp. 1979). The Hearing Officer in the instant Briggs case reported using "the clear and convincing

test" (App.C-86) but he did not do so on one of his most important evidentiary findings. (See Part H of this Petition under Harm to Appellant.)

State courts are also confused as to what the Federal Constitution mandates with respect to disciplinary proceedings. California suggests that procedural due process in quasi-criminal disciplinary proceedings includes notice and opportunity to be heard, the opportunity to present a defense, the opportunity to engage in discovery, and the opportunity to present evidence prior to the imposition of discipline. See In re Strick, 34 Cal.3d 891, 196 Cal.Rptr. 509, 671 P.2d 1251 (1983). Pennsylvania, while asserting that some due process rights do exist, views disciplinary actions as almost exclusively civil in nature and afford attorneys little or no constitutional protections during the

proceedings. See In re Oxman, 437 A.2d 1169 (Pa. 1981), cert. den., 456 U.S. 975. For example, Pennsylvania holds attorneys have no 6th Amendment right to a speedy trial in disciplinary proceedings.

A strong example of the confusion as to what body of case law, and hence what rights, apply to disciplinary actions is the Colorado case of People v. Harfman, 638 P.2d 745 (Colo. 1981). The Harfman court noted,

> "[d]isciplinary proceedings, in our view, are not criminal... [but rather, are] sui queris, and rules for civil, criminal, and administrative proceedings do not automatically apply ...thus, we must make a case-by-case analysis of every disciplinary complaint to determine whether a particular rule of civil or criminal law should be applied." Id. at 748.

A confused state of affairs also exists in Indiana, the State at issue, which forces accused attorneys to guess at which protections are available. The Supreme Court of Indiana has noted:

> "[P]revious decisions have recognized the unique character of [disciplinary] proceedings and resolved issues of constitutional application within the framework of this understanding. ...[T]he rules of pleading and practice in civil cases shall not apply. ...[T]his Court has also held that a disciplinary proceeding is not a criminal proceeding. (citations omitted). Thus, the application of constitutional standards generally afford a criminal defendant are not appropriate. Matter of Roberts, 442 N.E.2d 486, 988 (Ind. 1982) (emphasis added).

Because the rules of civil procedure do not apply, an Indiana attorney in a disciplinary case is denied the right to file a "Motion to Dismiss for Delay under Indiana Trial Rule 41 (E)." Since it is not a criminal action, an Indiana attorney cannot file a "Motion to Dismiss for Delay under Indiana Criminal Rule 4." The Indiana Supreme Court apparently intended to make every effort to deny procedural remedies to its lawyers when it adopted disciplinary rule: Ind. R.A.D. 23, Section

14(a) which provides, "...no Motion to Dismiss or dilatory motion shall be entertained...."

In the Hearing Officer's Report in the instant Briggs case he states, (App.C-137)

> "....the rules limiting preliminary or dilatory proceedings make fact-finding hearings with constitutional or precedural issues to preserve a bit unwieldy. Upon originally misreading In the matter of Zarko Cekerez 458 NE2d 229, (1984), this officer felt that he could not separate substantive and procedural matters into two such hearings although, at this juncture, [at this juncture meant that the Hearing Officer's conclusions were made after the trial and too late to benefit this Appellant] it would appear that an officer does and should have such opportunity within his sound discretion; and (3) our present reporting methods of publishing only those cases where misconduct is determined makes citations of Indiana authority for either substantive or procedural matters favoring respondents extremely rare; no balancing determination of proper activity by counsel in difficult areas of the law are printed so that re-

> spondent ends up resorting to other jurisdictions for authority. In the long term, this may create an imbalance, inviting federal interference on due process gounds; ..." (emphasis added) (App.C-137).

Hence, States such as Indiana and Arizona have unfettered discretion to deny or afford rights which amounts to no law -- as Hearing Officer Morton said, there are no printed decisions for many Disciplinary cases processed by the Indiana Supreme Court. (emphasis added).

For a nation which professes to be highly civilized with its historical background of reliance on rules of law, current procedure in disciplinary actions represents a step-back of several centuries and bears resemblance to Star Chamber Proceedings. Attorneys are in a "Catch 22" situation; they may turn to neither civil nor criminal law when seeking to establish their defenses. In essence, accused attorneys are forced to

guess which rights they may have when defending their livelihood, and must await the Court's decision to determine whether or not they were justified in asserting those rights. In Indiana an attorney's rights are even more muddied. The Hearing Officer as an arm of the Indiana Supreme Court; hears the case, makes preliminary findings of facts and law, determines misconduct if any, and recommends punishment. Objections by an attorney are permitted to the Hearing Officer's report, but the Indiana Supreme Court is a court of original and final jurisdiction with no appeal. It is not required to accept the Hearing Officer's findings or recommendations. This doubles the attorney's quandry over whether to file objections to the Hearing Officer's report. Even if the attorney agrees with it, objections must be filed before he knows if the Indiana Supreme Court will

accept the Hearing Officer's report. The present state of affairs in disciplinary proceedings is unfair and highly prejudicial to the individual when determining how to best present his defense. To prevent attorneys from any further guessing as to which rights they have in disciplinary proceedings, this Court should grant certiorari and specify what the Constitution demands in these proceedings.

Part C
RIGHT TO SPEEDY TRIAL AND DUE PROCESS PROTECTION AGAINST DELAY MUST ATTACH IN DISCIPLINARY PROCEEDINGS

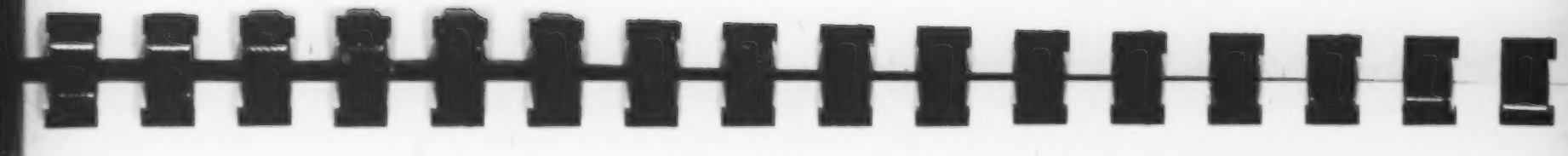
Disciplinary Proceedings are Comparable to Criminal Proceedings -- Speedy Trial Must Attach to Preserve the Attorney's Due Process Right to Present an Adequate Defense -- Speedy Trial Must Attach to Effectuate Policy Underlying Proceedings.

The use of "quasi-criminal" to categorize disciplinary proceedings allows courts to avoid answering the question as to what rights attach, and increases ad hoc as well as sui generis decisions.

Disciplinary Proceedings are quite comparable to criminal proceedings. Erdmann v. Steven, 458 F.2d 1205, 1209 (2d Cir. 1972); see Person v. Ass'n. of Bar of City of New York, 554 F.2d 534, 536 (2d Cir. 1977). In both criminal and disciplinary proceedings, the accused is subject to punishment. See Matter of Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975). Although incarceration is not an available sanction, other highly important rights are taken. The State can deprive the attorney of his license to practice law. This deprives an American citizen of one of his most cherished property rights and divests him of his very livelihood. "Suspension from the practice of law is a deprivation of 'liberty' or 'property' within the meaning of the Due Process Clause...". State ex rel. Roberson v. Oregon, 632 P.2d 1255 (Or. 1981). Procedural due process requires that "one

whom it is sought to deprive of such rights ... be given an opportunity to defend himself; and the proceedings looking toward deprivation must be essentially fair." Annot: Suspension or Revocation of Medical or Legal Professional License as Violating Due Process - Federal Cases, 98 L.Ed. 851, 855 (1953). "It is not the issue of whether a lawyer ... is entitled to due process ... but, instead, whether ... he has, in fact, been afforded such due process." Id. at 852 (emphasis in original).

Disciplinary proceedings are designed to protect the public, In re Ruffalo, 390 U.S. at 550, by stripping a wrondgoing attorney of his ability to represent to the public that he is in "good standing" to practice law. See Theard v. United States, 77 S. Ct. 1274, 354 U.S. 278, 281, (1956).



Although this Court has never held expressly that the right to a speedy trial attaches to State disciplinary proceedings it should now do so. Petitioner seeks this Court's holding that he had the right to a speedy trial under the 6th Amendment in this disciplinary action, or, in the alternative, that such unjustified delays by the State of Indiana in prosecuting his case were so fundamentally unfair as to violate the Due Process Clause of the Fifth Amendment.

C.1. Delay in Disciplinary Actions Undermines Policy of Protection to the Public.

The few states that have denied attorneys the right to a speedy trial in disciplinary actions have gravely misconstrued the rationale underlying disciplinary proceedings. A proper policy favors handling attorney discipline with dispatch in order to effectuate the underlying policy of protection to the

public -- so that the public will truly be protected from wrongdoing attorneys.

States that deny attorneys the right to a speedy trial in disciplinary actions do so because "it would not be in the public interest to dismiss [a] disciplinary proceeding for no reason other than the Bar's failure to prosecute them with proper dispatch." In re Weinstein, 254 Or. 392, 384, 459 P.2d 548, 549 (1969); see also, In re Oxman, 437 A.2d 1169, 1172 (Pa. 1981). However, other states have expressly recognized that in order to effectuate the "protection of the public" rationale of disciplinary actions, "disciplinary proceedings should be handled with dispatch." The Florida Bar v. Randolph, 238 So.2d 635, 638 (Fla. 1970); see also In re Smith, 75 Ill.2d 134, 25 Ill. Dec. 660, 387 N.E.2d 316 (Ill. 1979); People ex rel. Colorado Bar Ass'n v. Tanquary, 48

Colo. 122, 109 P.260 (Colo. 1910); Giddens v. State Bar of California, 170 Cal.Reptr. 812, 621 P.2d 851, 855 (Cal. 1981) (Richardson, J., dissenting). The reason "[i]t is desirable and in the public interest that attorney disciplinary proceedings move expeditously...", In re Smith, 387 N.E.2d at 319, has been set out clearly by the Florida Supreme Court where it noted:

> "Such inordinate delays are indeed unfair and even unjust to one accused. They permit violaters to remain active in practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the canons of ethics. Worst of all, perhaps they undermine the public confidence in the bar's announced determination to keep its own house in order. The Florida Bar v. Randolph, 238 So.2d at 638."

Consistent with this policy, the same court a few years later noted:

> [Despite the fact that the attorney was partly responsible for the lapse in proceedings,]

> we are convinced that the overall lapse of time involved in these proceedings of four years has largely nullified any benefit to the public and the Bar to be achieved by disbarment or suspension of [the attorney]..... Disciplinary proceedings are instituted primarily in the public interest and to preserve the purity of the Bar. Those interests will not be served at this late date by [the attorney's] suspension. The Florida Bar v. Welch, 272 So.2d 139, 141 (Fla. 1972) (emphasis added).

Regardless of whether a holding is based on the right to a speedy trial or due process, the United States Supreme Court should now follow the above or a similar rationale and hold that in a disciplinary proceeding unjustified delay by a state in prosecution or in discipline nullifies any benefit to the public and the bar.

C.2. Delay in the Prosecution of Disciplinary Actions Eliminates the Individual's "Meaningful" Opportunity to be Heard, May Result in Lost Evidence Denies Effective Judicial Review, and Supports Dismissal of the State's Action or Mitigation of Disciplinary Sanctions.

This Court has recognized that the Sixth Amendment right to a speedy trial is "one of the most basic rights preserved by our Constitution." Dickey v. Florida, 398 U.S. 30, 32, 26 L.Ed.2d 26, 90 S.Ct. 1564 (1970). This Court has also recognized that "[t]he right to due process reflects a fundamental value in our American Constitutional system." Boddie v. Connecticut, 401 U.S. 371, 374, 28 L.Ed.2d 113, 117, 91 S.Ct. 780 (1971). Because disciplinary proceedings are "quasi-criminal" in nature, various states have felt free to conduct disciplinary actions as amorphus proceedings which deny individual attorneys fundamental rights. "Where the protections of the U.S. Constitution conflict with the efficientcy of the system to ensure professional conduct, the Constitution must prevail and the system must be modified to conform." Polk v. State Bar of Texas, 374 F.Supp.

784, 785-87. Because of the uncertaintly as to what constitutional rights apply to disciplinary proceedings, this Court should grant certiorari to ensure that constitutional protections are uniform across the country.

C.3. Speedy Trial -- Why it must attach?

State courts should be required to provide the attorney a speedy trial. As one court has noted, "[t]he right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection." Giddens v. State Bar of California, 170 Cal.Rptr. 812, 621 P.2d 851, 854 (Cal. 1981). A review of the speedy trial guarantee in the context of criminal prosecutions demonstrates similar rationales support an extension of the speedy trial guarantee to the context of quasi-criminal disciplinary proceedings where a state seeks to deprive an

individual of valuable and cherished rights.

"[T]here appears to have been general agreement among the Framers [of the Constitution] that a speedy trial is essential to fundamental fairness." Dickey v. Florida, 398 U.S. at 39 n.2 (Brennan, J., concurring). As Justice Brennan has noted:

> "a speedy trial is intended 'to minimize anxiety and concern accompanying public accusation.' (citations omitted)... [L]engthy prosecution may subject the accused to 'public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.' (citations omitted). These disabitlites ... can impair the accused's ability to mount a defense. The passage of time by itself, moreover, may dangerously reduce his capacity to counter the prosecution's charges. Witnesses and physical evidence may be lost; the defendant may be unable to obtain witnesses and physical evidence yet available. His memory and the memories of his witnesses may fade.... '[P]assage of time

> makes proof of any fact more difficult. (citations omitted). Id. at 34.

These concerns are equally present in disciplinary proceedings where prolonged prosecutions may deprive the accused attorney of his ability to adequately defend himself. Indiana and the U.S. Supreme Court have recognized that in criminal actions prejudice can result from loss of defense witnesses and loss of memory which may result in lost record which prevents effective judicial review. (emphasis added). Scott v. State, Ind.App., 461 N.E.2d 141 (1984) which follows directly from Barker v. Wingo, 407 U.S. 514, 33 LEd2d 101, 92 S.Ct. 2182 (1972). Although Scott is a criminal case, the basis for the decision is the serious harm which results from delay. The same rationale applies equally to disciplinary proceedings. On page 143 Scott says,

> "...the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a case, prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

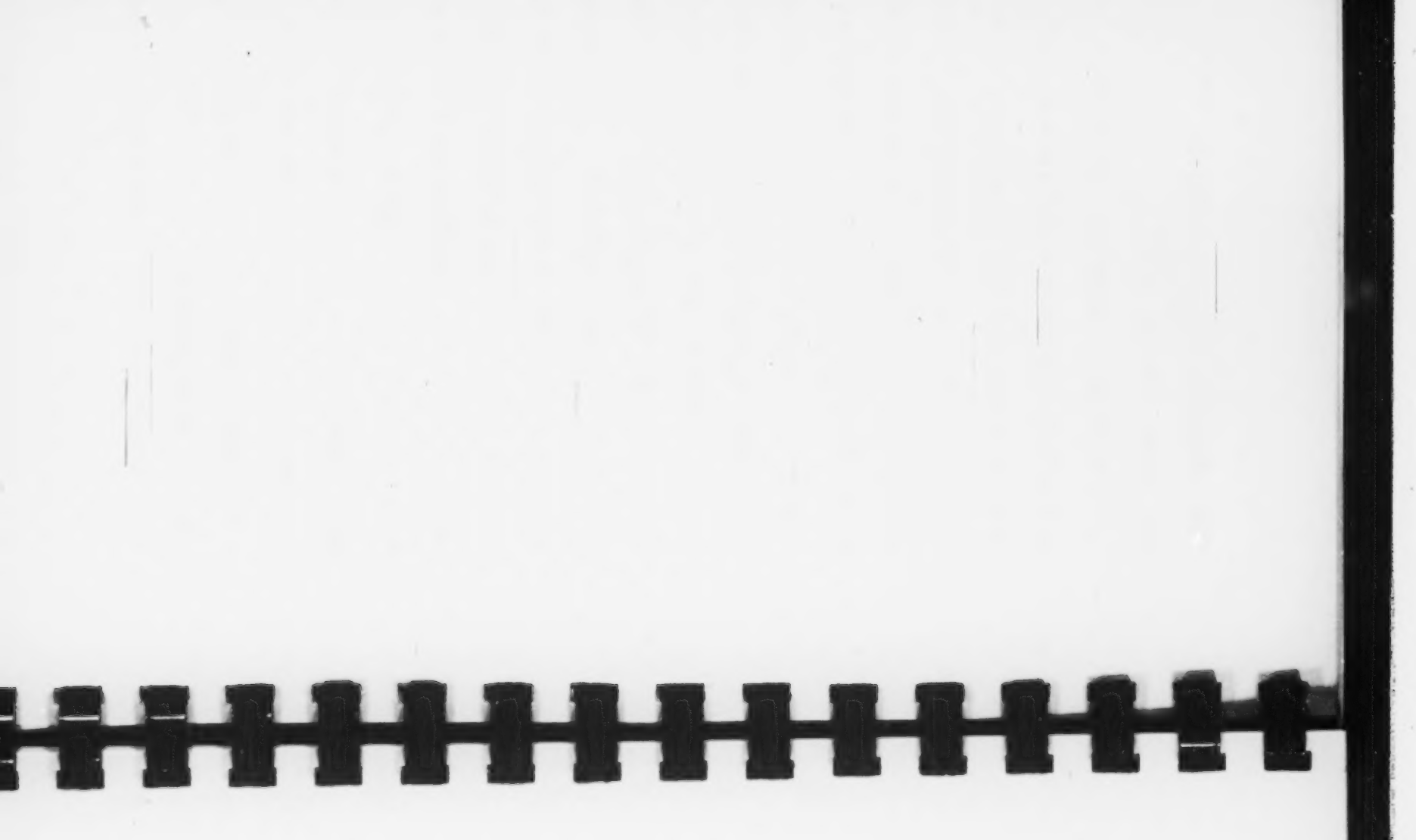
Justice Brennan has further noted that the Speedy Trial Clause also protects societal interests by assuring effective prosecution of cases to "both restrain those guilty of crime and to deter those contemplating it." Id. at 35. The analogy to disciplinary proceedings is apparent as their very purpose is "to protect the public." In re Ruffalo, supra. Lapse in time in disciplinary proceedings "largely nullifi[es] any benefit to the public and the Bar to be achieved by disbarment or suspension...".

The Florida Bar v. Welch, 272 So.2d 139, 141 (Fla. 1972).

Because similar interests will be protected by requiring speedy disciplinary prosecutions as are protected by requiring speedy criminal prosecutions, this Court should now extend the right to a speedy trial to disciplinary proceedings. At present, many states are allowed to prosecute disciplinary actions totally at their leisure by simply asserting that disciplinary actions are not criminal in nature. This greatly prejudices the accused attorney's defenses and does not conform to the "protection of the public" rationale of disciplinary proceedings. This Court should clear-up this situation by requiring that states discipline attorneys in a speedy fashion.

C.4. Due Process -- What process is due -- Why it must attach?

Attorneys are entitled to procedural



due process in disbarment proceedings. In re Ruffalo, supra. At a minimum, due process requires that the accused individual be given notice of the charges and a "meaningful" opportunity to be heard. See Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, 118-20 (1971). Petitioner contends that when a state unduly delays prosecution of a disciplinary action to the accused attorney's detriment, the state effectively eliminates that attorney's meaningful opportunity to be heard so as to violate the Due Process Clause of the Fifth Amendment.

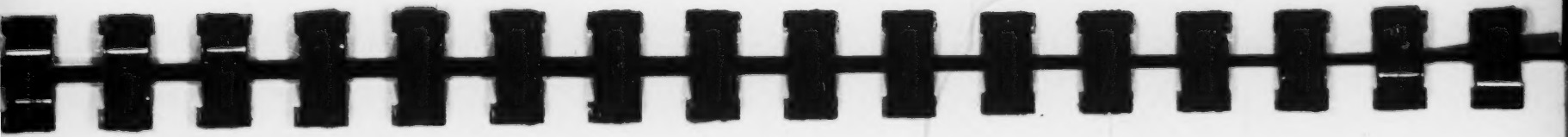
"[A] State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." Id., 401 U.S. at 379 (emphasis added). The opportunity to be heard must be granted "at a meaningful time and in a meaningful manner."

Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62, 66 (1965). "The right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Boddie, 401 U.S. at 379-90, 91 S.Ct. 780, 28 L.Ed.2d at 120.

Just as a Statute, "valid on its face, may offend due process because it operates to forclose a particular party's opportunity to be heard," Id., a state may give a hearing which appears valid on its face, but, because of lapse in time, prevents a meaningful opportunity to be heard. Lengthy prosecution can "impair the accused's ability to mount a defense" by causing "witnesses and physical evidence [to] be lost", "memories [to] fade", and " proof of fact[s to become] more difficult," and "loss of effective

judicial review." See Dickey v. Florida, 398 U.S. 30, 42, 90 S.Ct. 1564, 26 L.Ed.2d 26, 34 (1970) (Brennan, J., concurring). When a state delays in affording an accused attorney a hearing which results in the inability to effectively present his defense, the state has afforded the attorney a meaningless opportunity to be heard in violation of the Due Process Clause.

Since disciplinary proceedings can deprive attorneys of their very livelihood, the process due to attorneys during these proceedings must be "substantial." See In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972). Because "the right of a lawyer ... to practice his profession is often more valuable to him than his home ... when a state seeks to ... disbar a lawyer, it must proceed according to the most exacting demands of due process of law." Law Students Civil



Rts. Res. Coun., Inc. v. Wadmond, 401 U.S. 154, 175, 91 S.Ct. 720, 731, (1971) (Black, J., concurring) (emphasis added); see also In re Bithoney, 486 F.2d 319, 323 (1st Cir. 1973). A disciplinary hearing, held after such a lapse in time that any opportunity which the accused had to present a meaningful defense is lost, does not meet the exacting standards of the Due Process Clause. This Court should now restrain the current unchecked discretion of states in the disciplinary area by demanding that states provide accused attorneys with prompt hearings, so as to preserve their right to a "meaningful" opportunity to be heard as mandated by the Due Process Clause.

Part D

RESPONSIBILITY FOR EXERCISING DILIGENCE AGAINST DELAY IN DISCIPLINARY ACTIONS

Responsibility Rests with the Bar, Not the Attorney, and Unjust Delays Resulting from Lack of Diligence Supports Dismissal of Charges or Mitigation of Sanctions.

Many courts have recognized that delay by a State in prosecuting a disciplinary action has adverse effects both on the attorney and his defense which supports dismissal of the action. See, e.q., Tennessee Bar Asso. v. Berke, 48 Tenn.App. 140, 344 S.W.2d 567 (1960) (long delay unexplained by record coupled with proof witnesses had died or become unavailabe was ground for dismissal); In re Ratner, 194 Kan. 362, 399 P.2d 865 (1965) (charges so stale it was inequitable to act on them). Other courts have recognized that long delays in prosecuting disciplinary actions, results in prejudice to attorneys and is a form of punishment which is a mitagating factor when imposing sanctions. See, e.q., Arden v. State Bar of California, 52 Cal.2d 310, 341 P.2d 6 (1959) (fact proceedings had been "hanging over attorney's head" for three years supported reprimand rather

than suspension); Matter of Swartz, 129 Ariz. 288, 630 P.2d 1020 (1981) (fact matter pending for six years supported censure rather than suspension).

Petitioner contends that the State of Indiana's lack of diligence in the prosecution of his case, which resulted in the proceedings "hanging over his head" from 1977 to 1987, justified the dismissal of the charges against him, or, in the alternative, should have been considered as a mitigating factor when his sanction was imposed.

The fact that an attorney does not demand diligent prosecution of his case should not relieve the State of its burden to do so.

> "[T]he responsibility for excercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This

> is so even though the record shows that the conduct of the lawyer merits discipline." The Florida Bar v. Randolph, 238 So.2d 635, 639 (Fla. 1970).

Even Indiana has recognized that "the ultimate responsibility for affording speedy trial rights rests with the government rather than with the defendant." Springer v. State, 372 N.E.2d 466, 471 (Ct.App.Ind. 1978) (citing Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)).

The State of Indiana failed to meet its responsibility to bring Appellant to trial with diligence. This resulted in irreparable prejudice to Petitioner's defense in this disciplinary proceeding. Outside of these proceedings, the Petitioner and his family have suffered harm to family life, sizeable economic losses, loss of reputation, and ten long years of agony and anxiety. (See Part H of this Petition for harm) Although the

Supreme Court of Indiana has termed the delay in Petitioner's case as "incidental" (See Part F of this Petition), an examination of the record shows that Appellant contributed only minimally to the almost ten year delay which it took to process this proceeding. The bulk of the delay was unjustified. See, infra, Part F at 49. For these reasons, this Court should grant Certiorari and terminate, or in the alternative, reduce Appellant's suspension on the basis of the State's delay in the prosecution of the case at bar.

Part E

EXERCISE OF JURISDICTION BEYOND THE TIME LIMIT IS VIOLATION OF RULES AND DENIES DUE PROCESS IN DISCIPLINARY PROCEEDINGS

Long Delay Grossly in Excess of 60 Day Time Limitations for Holding Hearing Under Indiana Disciplinary Rule 23, Section 13 Violated Rules and Caused Court to Lose Jurisdiction and Denied Due Process.

The Indiana Supreme Court recognized the urgencey for conducting Disciplinary

Proceedings when it adopted in its legislative capacity a rule with its 60 day time limitation for holding a hearing in Disciplinary Proceedings. See Disciplinary Rule R.A.D. 23, Section 13. Adopting a Disciplinary Rule is a legislative act. Adjudicating a disciplinary complaint by use of its own disciplinary rule adopted prior thereto is a judicial act. Sup. Ct. of Virginia v. Consumers Union, 446 US 719, 64 L Ed 2d 641, 100 S Ct 1967 (1980).

Once a rule is adopted by a court in its legislative capacity, the same court in its judicial capacity is bound to follow its own rule. Sed Id.

Jurisdiction of any court is three-fold in that it embraces three essential elements: (1) jurisdiction of the subject matter, (2) jurisdiction of the person, and (3) jurisdiction of the particular

case. 7 I.L.E. 407; 21 C.J.S. 37, Sec. 25; 20 Am Jur 2d 449, Sec. 87 et seq. Jurisdiction of the particular case is here called into question. The Indiana Supreme Court and its arms, the Disciplinary Commission and the Hearing Officer totally disregardded the 60 day limitation of its own rule in the instant Briggs case. Processing this case covered about 7 years from grievance to trial; and covered about another 3 years from trial to judgment of suspension totalling almost 10 years. See Part F for discussion on cause of delay. A 7 year delay subject to a 60 day limitation is an attempt by a court to exercise jurisdiction outside of the grant of jurisdiction -- is an assertion of authority not granted -- which causes a court to lose jurisdiction.

Indiana case law has applied the rule "loss of jurisdiction of a particular case" to both civil and criminal cases but

has never applied it to a disciplinary case. Robinson v. State, 359 NE 2d 924 (1977); Lemand v. McComack, 413 NE 2d 228, 246 (1980); Lowery v. State Life Ins. Com., 54 NE 442 (1899); Twyman v. State, 459 NE 2d 705 (1984); Farley v. Farley, 300 NE 2d 375 (1973). In order to prevent lengthy delays in disciplinary proceedings, the Court should declare that the "loss of jurisdiction rule" is applicable to disciplinary cases to guarantee due process of law.

Part F

Overall Delay in this Case Largely Rests With the Disciplinary Commission.

[Please refer to the facts included in the Statement of the Case under Course of Proceedings incorporated herein.]

The over-all delay in processing of this disciplinary proceeding has not been caused by Appellant but has been caused by the Disciplinary Commission, its attorneys, and the Supreme Court itself. All

of the alleged violations relate to Mary Bernice smoker, who died in 1979. Petitioner never has been notifed that he was ever the subject of a grievance in any other matter. It would be difficult to realistically view the delays as scheduling problems of the court or disciplinary commission. Such nomenclature appears to be an attempt to cover-up for the un-precedented almost ten (10) year delay in processing this case from grievance to judgement of suspension.

Part G

REDRESS FOR GRIEVANCE
FOR CONSTITUTIONAL RIGHTS

Why Right to Redress for Grievance Includes Right to Raise Consitutional Issues by Pre-Trial Motions.

Why Right to Redress for Grievance For Constitutional Issues Includes Right to Pre-Trial Hearing or Right to Bifurcated Trial Hearing.

Under Amendment 1 to the United States Constitution, citizens have a right to seek redress of grievance for denial of

fundamental rights. Due Process under Amendments 5 and 14 require it to be timely redress so as to be meaningful.

The Indiana Supreme Court and the Hearing Officer overruled Petitioner's requests for a separate hearing on constitutional issues at pre-trial or bifurcation at trial. He was forced to sandwich-in his numerous constitutional objections at a elngthy trial already under time pressure from complicated issues and multidudinous facts arising from a historical background of 20 years.

The broad extent of denial, of preocedural rights, in this and other Indiana disciplinary actions, is illustrated as follows: If this had been a civil action, a "Motion to Dismiss for delay under Ind. T.R. 41 (E) could have been filed. If this had been a criminal action, a "Motion to Dismiss for delay under Ind. C.R. 4 could have been filed.

Both such motions were not available. Moreover, Indiana has completed the gap in its "Iron Curtain Against Procedural Remedies in Disciplinary Actions." by its disciplinary rule, Ind. R.A.D. 23, Section 24, which provides, "...no motion to dismiss or dilatory motion shall be entertained...." Note that the word "entertained" implies that such motions if filed, will not even be considered. In Indiana a lawyer in a disciplinary action has far less rights than his fellow citizens have under civil or criminal procedure.

The Hearing Officer stated in his Hearing Officer's Report. (App.C-137)

> '....the rules limiting preliminary or dilatory proceedings make fact finding hearings with constitutional or procedural issues to preserve a bit unweildy....'. [he was refering to Ind. R.A.D. 23, Sec. 14(a)]

In Indiana a Hearing Officer, as an

appointee of the Supreme Court is a kind of referee to hear a disciplinary case. See Ind. R.A.D. 23, Sections 13(a), 13(b), 14(a), 14(e), 14(f) and 15(a). He has the duty to conduct a hearing and make findings of facts; to determine whether there has been misconduct and its nature; and to make recommendations as to punishment. In Indiana the only "trial," in the sense it is used in Constitutional Law for due process, is the hearing before the Hearing Officer. The Indiana Supreme Court is the court of original as well as final jurisdiction. It is not required to accept the facts, findings, and recommendations of the Hearing Officer. Although an attorney can file objections after the Hearing Officer's Report, he must do so before he knows if the Supreme Court will accept the Hearing Officer's Report. The "chilling effect" cannot be doubted. There is no appeal to any other

court. In the instant case, Petitioner was irreparably harmed because he was denied the right to have his motions, seeking redress for constitutional protections entertained, and given more than a superficial denial before trial, and (2) He was denied the right to a hearing, to present evidence, and to present oral argument on his constitutional issues, either at a pre-trial hearing or by bifurcation at the trial. Because of these denials by the Hearing Officer and the Supreme Court, Petitioner was irreparably damaged and harmed. He was not granted protection against loss of constitutional rights which could not be eliminated by presententation at the trial. He was denied a fair trial. He was denied a meaningful opportunity to present a complete defense, and he was denied an opportunity to make an adequate record for

effective judicial review. Petitioner has no adequate remedy for monetary damages. Officials who process disciplinary complaints are all immune from lawsuits for damages under Indiana R.A.D. 23, Sec. 20. The Indiana Supreme Court has original and final jurisdiction. There is no provision for appeal. If the United States Supreme Court does not grant certiorari, there is no remedy for seeking protection for constitutional rights. The instant case resulted in irreparable harm: suspension of license to practice law.

Part H

HARM TO APPELLANT IN THIS PROCEEDING

Delay -- Denial of Fair Trial -- Denial of Opportunity to Present Full Defense -- Lost Testimony -- Lost Record -- Loss of Effective Judicial Review -- Denial of Redress of Grievance -- and Irreparable Personal Harm.

Appellant lost testimony of at least twenty-three (23) deceased or unavailable

witnesses. Eventually there were others. The issue was raised before and at the trial, and offers to prove were made by Appellant at the trial. The depositions of Bertha Wolfe (taken by Appellant) and of Mary Bernice Smoker (taken by Disciplinary Commission) were made a part of the record. The issue was again raised in the Petition for Review. In spite of all this notice, it failed "to trigger an inquiry" as to even the existence of serious constitutional problems. Appellant was required to proceed to trial, however it was impossible to make a satisfactory record for effective judicial review. Some concrete examples of lost record here follow. Howard Kirkendall (ill) could have testified as to grievant Smoker's habit of reneging upon promises which relates directly to the issue of Petitioner's "so-called" burden of overcoming the presumption of undue influence

as to an attorney-client employment contract and joint Certificate of Deposit. There was no direct evidence of undue influence. The court hung its hat on "lack of over-coming a presumption." It is improper to use such a presumption in disciplinary cases. This was improper for two reasons. First, inferences and presumptions do not apply in disciplinary proceedings because of the seriousness of the consequences to the attorney. (See 7(A) CJS 50.) And secondly, Hearing Officer Morton based the undue influence on a finding in the Smoker guardianship civil case. This was again wrong because the standard in a civil case is only on a "preponderance," and the standard in disciplinary proceedings in Indiana is "must be clear and convincing." Judge Robert Monro in the civil case admitted that he based the finding of "undue influence" on lack of overcoming the

presumption. (See the Hearing Officer's Report at App.C, page 22, 4th line from bottom.) Smoker (deceased) in her deposition professed lack of any recollection of authorizing the documents. Bertha Wolfe (ill and out of State) could have rebutted the so-called presumption since Mrs. Wolfe and five (5) other witnesses, were present at its execution. Ralph Hanna (deceased), could have testified as to prior Smoker wills which he had prepared. That her educational trusts were her lifetime goal--akin to natural object of her county. He could have testified that Smoker thought her bequests to other lawyers and their families in prior wills to be completely normal and regular.

Mr. Stewart (deceased), attorney for Appellant, could have rebutted Disciplinary Commission attorney Hughes' contention that Hughes and Appellant's

attorney, Stewart, had informally but privately agreed to wait until termination of civil proceedings before going ahead with the disicplinary proceeding. He could have rebutted testimony of Reverend Arthur Schenck as to alleged violations of communicating with others. Smoker, the principal grievant, could have been cross-examined as to the alleged delay of termination of the guardianship proceedings. This violation was not alleged until after Mary Bernice Smoker's death by way of an amended complaint which prevented cross-examination of Smoker on this point at the trial or in her deposition. Clarence Watson (deceased), and Leslie Avery (deceased), were important rebuttal witnesses to Jeanne Jones and Judy McKinnley on the harrassment issue.

Because of loss of memory Mary Bernice Smoker (deceased), in her

deposition of December 1977, only remembered making a 1967 hospital will and a 1970 will but could not remember an in-between 1968 will and circumstances surrounding it.

Petitioner suffered a severe loss of the face to face testimony of the very credible witness Bertha Wolfe, Secretary in the Briggs Law Office at the time the 1968 and 1970 Smoker Wills were made. She was elderly, ill, and out of State by the time of trial. Her deposition was taken before the Disciplinary Commission filed its second Amended Complaint. In the presence of Smoker, Wolfe took down the information for preparation of the Smoker wills. Additionally Wolfe and Smoker listened to Appellant dictate large portions of both the 1968 and 1970 wills. Wolfe could have testified that Smoker had the rough drafts in her hands at her home and read them over carefully. Wolfe could

have testified as to circumstances surrounding preparation of the wills and disclosure and advice by Briggs to Smoker. All of this had such a tremendous bearing on the attorney disclosure requirements of the vague and uncertain language of the old pre-1970 ABA Canons upon which the alleged violations in the second Amended Complaint as to preparation of the 1970 Smoker will. (App.A-6 and App.C-86).

As examples, Appellant had to disprove that he failed to give "full disclosure." He had to disprove that he had acted "without consent of his client and that he had not failed to make full disclosure." He had to disprove that "he failed to disclose to the client all the circumstances."

The Kutak Commission of the American Bar Association on Evaluation of Professional Standards has determined that

even some of the 1971 Disciplinary rules are incapable of definition, are imprecise and are not useful as a guide for conduct. The void-for-vagueness doctrine is discussed in the case of Kolender v. Lawson (1983)461 U S 352, 75 L Ed 2d 909, 103 S.Ct 1 855, See annotation commencing at 75 L Ed 2d 1049.

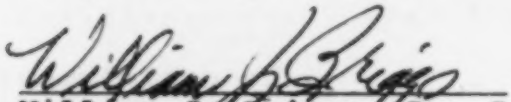
Joseph T. Ives Jr, an attorney who at one time represented Briggs, testified at the trial that Copenhaver, attorney for the Disciplinary Commission, had said that the Commission wanted to make Briggs a test case in order to obtain a ruling on "just how far an attorney could go before he had to throw his client, who wanted to make a gift to him, out of his office." Subsequent action by the Indiana Supreme Court indicates that the Indiana Supreme Court had already recognized (before entering judgment in January of 1987 on Appellant's case) the vagueness of old

Canons and Indiana Disciplinary Rules. This same court denied Appellant the right to be protected from such vagueness. The Indiana Supreme Court adopted a completely new rule effective in 1987 to obviate the vagueness and uncertainty of its former rule. The new 1987--rule 1.8 designated as "CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS" reads, "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee." A comparison of the old Canons with the new rule 1.8 (Supra) demonstrates the uncertainty and vagueness by which the old Canons failed to provide an explicit and ascertainable guide upon which an attorney could measure his conduct and duties to his client. The

testimony of Bertha Wolfe could not be made a part of the record.

The long delay in processing this action caused irreparable harm to Petitioner in his defense, including loss of testimony of many key witnesses, loss of memory of many others, denied the right to present a complete defense, and denied the right to an adequate record for judicial review ultimately denying Appellant a meaningful opportunity to present his defense, fair trial and equal protection.

Respectfully Submitted



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Flora, IN 46929
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APPENDIX

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CERTIFICATE OF SERVICE AND MAILING

I, William J. Briggs, being first duly sworn upon oath, hereby certify that the original and 39 additional copies of the annexed Petition for Writ of Certiorari was mailed by me, next day service, postage prepaid, addressed to the:

> Office of the Clerk, Room 30,
> United States Supreme Court,
> Washington, D.C. 20543

I made such mailing on the 11th day of June, 1987, by depositing same for mailing at the office of Federal Express, 731 Navco Drive, Lafayette, IN 47905.

I further certify that I mailed 3 copies of the same pleading by ordinary mail with first class postage prepaid, to each of the following persons or entities, to-wit:

> 1. Disciplinary Commission of the Supreme Court of Indiana, to the attention of Mr. David Hughes, Attorney, ISTA Building,

150 W. Market Street, Room 814, Indianapolis, IN 46204.

2. Attorney General, State of Indiana, State House, Indianapolis, IN 46204.

I further certify that I mailed 1 copy of the same pleading by ordinary mail with first class postage prepaid, to the following person, to-wit:

3. Chief Justice, Randall T. Shepherd, Supreme Court of Indiana, State House, Indianapolis, IN 46204.

I further say that I made such mailings to the last 3 entities or persons by depositing same for mailing on the 11th day of June, 1987 in the United States Post Office.

I further say under the penalties of perjury that the above facts are true.

William J. Briggs

William J. Briggs
Petitioner
P.O. Box 2
Flora, IN 46929

STATE OF INDIANA
SS:
COUNTY OF CARROLL

Subscribed and sworn to on this the 11th day of June, 1987.

Teresa A. Rush
Notary Public

My Commission Expires:
September 14, 1990
Resident of Carroll County, Indiana

86 1977

Supreme Court, U.S.
FILED
JUN 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

IN THE MATTER OF
FLORENCE ANNE BRIGGS, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF INDIANA

APPENDIX

FLORENCE ANNE BRIGGS
P.O. Box 2
Flora, IN 46929
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Pro Se

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APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution provide

1st Amendment

"RELIGIOUS AND POLITICAL FREEDOM.---Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

5th Amendment

"Criminal actions---Provisions concerning---Due process of law and just compensation clauses.---No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived or life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

9th Amendment

Rights retained by people.---The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

14th Amendment

Citizenship---Due process of law---Equal protection.---All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 7 Sec. 4, Indiana Constitution

Jurisdiction of Supreme Court.---The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or

disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than ten years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

AP Rule 4 (A) (1) and (2), Indiana Rules

> (A) Appeals from final judgments. Appeals may be taken by either party from all final judgments of circuit, superior, probate, criminal, juvenile, county, and where provided by statute for municipal courts. A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom. The Supreme Court shall have exclusive jurisdiction of:
>
> (1) Admissions to practice law;
>
> (2) The discipline and disbarment of attorneys admitted to the practice of law;

Indiana disciplinary rule AD 23 provides in relevant part:

> (a) AD 23 Sec. 6(a): The Disciplinary Commission is appointed

by the Supreme Court of Indiana.

(b) AD 23 Sec. 10: Investigatory procedures.---(a) Upon receipt of a written, verified claim of misconduct (hereinafter) referred to as "the grievance"), from a member of the public, a member of this bar, a member of the commission, or a bar association and completion of such preliminary investigation as he deems appropriate, the executive secretary shall: (1) Dismiss the claim, with the approval of the commission, if he determines that it raises no substantial questions of misconduct; or (2) If he determines that it does raise a substantial question of misconduct, send a copy of the grievance by certified mail to the attorney against whom the grievance is filed (hereinafter referred to as "the respondent") and

shall request a written response within twenty (20) days after the respondent receives a copy of the grievance. In the event of a dismissal as provided herein, the person filing the grievance and the respondent shall be given written notice of the executive secretary's determination. In the event of a determination that a substantial question exists, the matter shall proceed to (b) hereinafter.

(b) Thereafter, after notice to the respondent, if the executive secretary, upon consideration of the grievance, the preliminary investigation and any response from the respondent, determines there is a reasonable cause to believe that the respondentis guilty of misconduct the grievance shall be docketed and investigated. If he

determines that no such reasonable cause exists, the grievance shall be dismissed with the approval of the commission. In either event, the person filing the grievance (hereinafter referred to as "the complainant") and the respondent shall be given written notice of the executive secretary's determination.

(c) If the grievance is docketed, for investigation, the executive secretary shall conduct an investigation of the grievance. Upon completion of the investigation the executive secretary shall promptly make a report of the investigation and his recommendations to the commission at its next meeting.

(d) In conducting an investigation of any grievance, or in considering the same, the executive secretary or

the commission shall not be limited to an investigastion or consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. In the event that the executive secretary or the commission should consider any charges of misconduct against an attorney not contained in the grievance, the executive secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification.

Any additional charges of misconduct against an attorney,

after such notice has been given by the executive secretary and the attorney has had an opportunity to reply thereto, may be the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this rule.

(c) AD 23 Sec. 9(b): The Executive Secretary appoints the staff.

(d) AD 23 Sec. 13(a): After a Complaint is filed, the Supreme Court of Indiana appoints a hearing officer.

(e) AD 23 Sec. 14(f): The Hearing Officer submits findings of facts and written recommendations to the Indiana Supreme Court.

(f) AD 23 Sec. 15(a): The Supreme Court examines the report of the Hearing Officer and enters judgment.

(g) AD 23 Sec. 16: Expenses. The executive secretary shall prepare an

itemized statement of expenses allocable to each case, including expenses incurred in the course of the investigatory, hearing or review procedures under this rule. The judgment of this court imposing such discipline shall also order the respondent to pay such expenses to the clerk of this court. Proceedings for the collection of the costs taxed against the respondent may be initiated by the executive secretary on the judgment entered.

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF

FLORENCE ANNE BRIGGS

Cause No. 783 S 262

DISCIPLINARY ACTION

Per Curiam

This case is before us on a Verified Complaint for Disciplinary Action filed by the Indiana supreme Court Disciplinary Commission. It is a companion case to In re William Briggs, which involves Respondent's law associate and spouse. After a lengthy joint hearing, the Hearing Officer, the Honorable Douglas B. Morton, has submitted his excellent findings, conclusions of law and recommendation in this case. The Respondent and the Commission have challenged different

(Filed Jan. 13, 1987)

aspects of the Hearing Officer's report and have petitioned for review of the same. In her petition for review the Respondent also requests to appear before this Court for the purpose of oral argument. Such request is hereby denied. She also takes issue with several statements contained throughout the report's 43 pages. Such issues will be resolved through this Court's determination of the ultimate findings and conclusions.

We have examined all matters presented and now find generally that the Respondent is a member of the Bar of this state, having been admitted in 1958 and is, therefore, subject to this Court's jurisdiction. She is engaged in the practice of law with her spouse, William Briggs. Though never under a formal partnership agreement, they held themselves out to the public as a partnership operating as Briggs and Briggs.

By way of background, we find that the Respondent was aware that William

Briggs began representing Mary Bernice (Kate) Smoker during the 1960's. Smoker was an elderly, childless widow with an estate of approximately 292 acre farm and $150,000 cash. Except for a few minor bills, Smoker did not pay for the representation but, in time, entered into an oral agreement with William Briggs for a lifetime legal service fee of $10,000. The Respondent was also conversant with the terms of a will prepared by William Briggs, whereby Smoker left William Briggs a specific bequest of $1,000. The will further established an educational trust specifying the Briggs' son, Winston, as a major beneficiary under the trust which would have paid for all college and post graduate school, and named the Respondent as co-executor and attorney for the trust.

Thereafter, Smoker's mental and physical health declined and she was hospitalized in October of 1976. Though she was released from the hospital, her health

remained marginal. On November 9, she met with William Briggs at her home and executed a codicil to her will nominating William Briggs as guardian, should one become necessary, and formalized the lifetime services contract by written agreement and by funding a $9,000 joint certificate of deposit in her and William Briggs' names. Thereafter, Smoker was again hospitalized and, upon her cousin's petition, a temporary guardianship was commenced on November 24, 1976, with William Briggs as guardian.

By January, 1977, Kate Smoker made a miraculous recovery, and her physician found that her physical and mental problems were in a state of "remission". At this time Smoker became aware of the guardianship and professed no recollection of making the joint certificate of deposit.

Notwithstanding her recovery, the guardianship was made permanent on January 13, 1977. During the next month, the long

standing relationship between Smoker and William Briggs deteriorated. In anticipation of large cash expenditures for Smoker's care, William Briggs had negotiated cash leases for Smoker's farm, a practice she strongly disapproved. Additionally, Smoker was exceedingly unhappy and frustrated with not having control of her business affairs. She was particularly incensed with William Briggs when he, correctly, refused to give her the key to her safety deposit box. However, he also taunted her by displaying the key and stating, "you don't like authority, do you?" Though not a participant, the Respondent was present during this event. Immediately after termination of the guardianship, Smoker executed a codicil to her 1977 will reaffirming its terms.

Kate Smoker set out to retain the services of Attorney R. Adrian Marks in order to terminate the guardianship. Marks

had her examined by two physicians, both of whom found her to be able to handle her own affairs, although, they found, she may be in the early stages of senility and showed some confusion.

At some point thereafter, William Briggs became aware that Smoker had sought the services of another attorney. This resulted in strong animosity between William Briggs, Marks and Bobby Ritchey, a friend of Mrs. Smoker who had assisted her in retaining attorney Marks. This also precipitated the filing of petitions by William Briggs (1) requesting that the court issue a temporary restraining order restraining certain persons, particularly Bobby Ritchey, from interfering with the ward, Smoker; (2) objecting to the filing of any pleadings allegedly signed or authorized by the ward; and (3) seeking a protective order against his producing any documents, should such allegations be made.

Upon Smoker's direction, on February 14, Marks presented a Petition to Remove the Guardian. On February 18, 1977, the Respondent, together with William Briggs, attended a pre-hearing conference on the matter. William Briggs and the Respondent had a lengthly conversation as to the advisability of his filing a "Petition to Terminate" the conservatorship based on Smoker's now apparent competency. William Briggs decided to file the petition against Respondent's counsel. It contained William Briggs' statement, without reservation, that the conservatorship should be terminated. At this juncture, the Respondent became a more active participant.

On February 23, 1977, Smoker executed a new will prepared at her direction by Marks.

After the filing of the "Petition to Remove" by Marks and the "Petition to Terminate" by William Briggs, William

Briggs, with Respondent's assistance, began delaying and resisting action on these petitions. On February 23, Marks sent a letter to William Briggs agreeing to the granting of Briggs' "Petiton to Terminate"; William Briggs did not answer the letter. Thereafter, Marks and Power, Smoker's other attorney, contacted William Briggs by telephone to discuss the same, but William Briggs refused to agree to the granting of his own petition. In a letter written on May 2, 1977, to Judge Munro, Special Judge in the guardianship case, William Briggs stated that he had informed Power that ". . . before I, myself, would agree to any order to any nature, including a dismissal of their Petition to Discharge, etc., there would have to be a finding that certainly I had NOT mismanaged the funds of Mrs. Smoker in any way." The Respondent drafted this letter for William Briggs' signature.

Between March 9 and 15, 1977, three physicians filed their written reports with the Court in which each of them affirmed that Kate Smoker was of sound mind and capable of managing her own affairs. On April 12, 1977, failing to get an agreed entry from William Briggs to his own petition, Smoker's attorneys filed a reply to the Petition to Terminate which admitted that the guardianship should be terminated. In a motion for summary judgment filed on April 19, Smoker's counsel pointed out that the parties and all physicians were agreed that Smoker was mentally competent. The Court then entered an order limiting the hearing to the issues raised by the "Petition to Terminate" and informed counsel that the court will take judicial notice of the physician's reports so that they need not testify. William Briggs filed his objection to this order arguing strenuously that the granting of his Petition to

Terminate without a hearing on the Petition to Remove would do "irreparable harm" to him because the Petition to Remove "has cast doubt on the character of William J. Briggs by innuendo." These objections and an Affidavit and Response were prepared by William Briggs and reviewed and concurred in by the Respondent.

During this period of time Smoker suffered great emotional distress due to the continuation of the guardianship and her own inability to gain control over her property. As noted by the trial judge and the hearing officer, the termination of a conservatorship where three physicians unanimously agree as to competence is a simple matter. However, in this instance, William Briggs treated this as an adversary proceeding for his own benefit and vindication, all the while being fully aware of the emotional harm beset upon Smoker. The Respondent assisted William Briggs in this action.

On May 26, 1977, the guardianship was terminated. The termination order directed that Smoker could take over her affairs immediately, that William Briggs was to file his final report within two weeks, that $2,000 was to be transferred to Smoker for her immediate use, and that all her papers and Will were to be made available for her at the time of the final report. Further confrontations, delay and strife accompanied the transfer of the ordered matters, though, in the end, the majority were turned over.

With the filing of his Guardian's Final Report, William Briggs also objected to his having to file a claim for services, claiming the contract with Smoker for lifetime services. His objections were overruled, and he filed a claim for $17,585 for serving as guardian for a period of six months and two days. The amount of the claim was an attempt to assure that the

$10,000 lifetime services contract would be paid.

In August, 1977, the Respondent made a request to withdraw from the case, but remained active nonetheless. William Briggs also employed attorney Joseph T. Ives, who entered his appearance in the guardianship matter and began participation in the disciplinary matter as well.

From May, 1977 to 1979, Kate Smoker managed her own affairs, but there was a gradual erosion of her condition. In anticipation of further deterioration, Smoker's deposition was taken for the William Briggs' disciplinary case. The Respondent was present and took Smoker's deposition for use in the guardianship case. On November 21, 1979, two weeks prior to the commencement of the trial of the final report in the conservatorship, Kate Smoker died.

On November 26, 1979, William Briggs, in consultation with the Respondent, filed sworn objections to the probate of any Smoker will executed subsequently to February 24, 1970. Respondent's and William Briggs' ultimate purpose in contesting the 1977 Smoker will and codicil was to preserve their family's benefits contained in the earlier will drafted by William Briggs. Smoker's competence was not challenged; the will contest was based on alleged undue influence in the execution of the 1977 will, on which issue the Respondent and William Briggs felt they could prevail. Attorney Ives did not significantly participate in the guardianship case and eventually dropped out. The Respondent became lead counsel in the guardianship trial. She and Smoker's attorneys, Marks and Power, were all called as witnesses in the guardianship proceeding which was held over a period of thirty days from December

3, 1979, to August 7, 1980. Though Smoker's Petition to Discharge was not an issue because the guardianship had been terminated, substantially all allegations therein were litigated during this trial. The trial court approved the final report except for the guardian's fees and attorney fees, all of which were denied based upon apparent conflict of interest; William Briggs' claim to the $9,000 certificate of deposit was set aside and the underlying contract for lifetime legal services was rescinded upon a theory of undue influence; Smoker's administrator's claim against William Briggs for misfeasance in managing the estate was denied. Included in the latter argument was an attempt to recover for psychological abuse and emotional strain, but the court held that Smoker's death rendered any such issue moot. William Briggs' claim for defamation allegedly caused by pleadings filed on July 14, 1977, was upheld, but he

received nominal damages of $1.00. The trial court further concluded that no oral contract nor implied contract for legal services had existed prior to November 9, 1976, that the prior services were rendered gratuitously and that fees could not be recovered on a quasi-contractual basis. Except for reversal of a $25 fee awarded to William Briggs and an order that appellate attorney fees be paid, the Court of Appeals affirmed the trial court. Rehearing and transfer were subsequently denied.

The Respondent and William Briggs were also attorneys of record for the plaintiffs in the will contest; in all respects the Respondent acted as lead counsel during this trial, knowing that her partner, William Briggs, would be a most significant witness.

On October 29, 1980, the Respondent wrote a letter to opposing counsel of record concerning a possible

settlement of the will contest. On November 8, 1980, the Respondent conveyed to Charles R. Vaughn, attorney for defendant beneficiaries, the Burlington United Methodist Church and the Burlington Cemetery Association, a settlement offer for $29,250, such sum being three fourths of estimated attorney fee expenses the Estate would expend in defending the Briggs claim. The Respondent contacted the special judge in the will contest to inquire whether she could directly contact parties to the will contest to determine if her settlement had been conveyed. The special judge advised her that she should not contact persons holding "decision making" positions.

Shortly thereafter, William Briggs contacted Reverend Arthur A. Schenck. The Reverend Schenck was a member of the Burlington United Methodist Church and a member of the church's Charge Conference and Administrative Board, the bodies within the

church which had decision making authority with respect to any settlements. William Briggs wanted the settlement to be communicated to the Church Board; he could not present the offer himself because the attorney for the church had forbidden such presentation. William Briggs informed Reverend Schenck that he had a claim for $17,000 for services performed for Kate Smoker and that he would dismiss the will contest if he was paid $29,000. The entire conversation occurred in Respondent's presence and with her knowledge, consent and active assistance. The Chairman of the Administrative Board of the church rejected the idea of presenting the settlement.

An eleven day trial to a jury ensued and, after eight hours of deliberation, the jury returned a verdict against the Respondent, effectively upholding Smoker's 1977 will.

The essential challeges in both Respondent's and the Commission's petitions for review are directed toward certain of the Hearing Officer's conclusions of law. The Respondent further claims that constitutional infirmities in the proceeding require dismissal of the charges and imposition of no sanction. The Hearing Officer has addressed the numerous constitutional issues raised by the Respondent at hearing and has made extensive findings as to those of colorable merit. On review before us now, the Respondent claims that she was denied a fair hearing because one of her witnesses, her former secretary, Bertha Wolfe, was unable to appear at the hearing due to illness. The Hearing Officer found that the Respondent had failed to explain the extent of the illness that apparently led to the absence; further, that the Respondent indicated that the testimony would have been favorable as to Respondent's character and

professional capacity, but in order respects would have been cumulative. The Respondent brings nothing more to this review. In light of the findings, we conclude that the not fully explained absence of the witness did not render the hearing unfair nor did it otherwise prejudice the Respondent.

Respondent next claims that the Hearing Officer failed to follow the "clear and convincing" standard of proof. This contention is simply unsubstantiated and without merit. The Respondent claims further prejudice alleging that certain findings made by the Hearing Officer are irrelevant to her case because they relate solely to her husband. She contends that such findings were included due to the consolidation of the two cases at hearing, an action opposed by the Respondent. The findings at issue relate to the fact that William Briggs brought an action in the Federal District Court for the Northern Dis-

trict of Indiana against this Court, the Commission, and its attorneys. The Respondent was not a party to such action. The Hearing Officer in this case and In the Matter of William Briggs, exerted inordinate efforts to present this Court with thorough, extensive and informative findings. The Respondent's argument fails to convince us that the findings at issue are irrelevant or that they are in any way prejudicial to her case.

Upon review of the specific charges, we find that the Respondent is charged with violating Disciplinary Rule 5-102(A) of the Code of Professional Responsibility by acting as counsel for William Briggs when it is obvious that she and her partner/spouse would be called as witnesses. The Hearing Officer concluded that the Respondent's conduct is not in violation of Disciplinary Rule 5-102(A). The Commission now challenges such

conclusion arguing that, under the plain terms of the rule, a lawyer may not appear in a proceeding in which he or a lawyer in his firm will be called as a witness. We are not persuaded by the Commission's contention. Though perhaps not advisable, a lawyer is free to represent himself in any proceeding. As such, he would, by necessity, be a witness, an advocate and an obviously interested party. Any prejudice or undue weight which his testimony could conjure in the mind of the trier is counter balanced by the obvious self interest being served. In the instance before us, the marital relationship, the close professional association and the potential familial benefits which could be gained, if successful, rendered the client's (Mr. Briggs') interests indelibly associated with those of the attorney/spouse. Under such circumstances, we agree with the Hearing Officer's conclusion that the Respondent's

conduct did not constitute misconduct under Disciplinary Rule 5-102(A). In light of our conclusion, Respondent's arguments relative to this charge are moot.

The Respondent is also charged with violating Disciplinary Rule 7-104(A)(1) by causing William Briggs to communicate a settlement offer to a party she knew to be represented by an attorney. The Respondent claims that her attorney, who passed away prior to trial, had interviewed the material witness, the Reverend Schenck, obtained contradicting information, and could have appeared before the Commission to dissuade them from filing this charge. However, she claims, that this opportunity was missed because the Commission neglected to notify her that she could appear before them. Respondent's argument is a tale of speculation unsubstantiated by any record; as such, we find it to be untenable. Accordingly, we conclude that the

Respondent's conduct relative to this charge is in clear violation of Disciplinary Rule 7-104(A) (1) of the Code.

The Respondent is further charged with assisting William Briggs in unreasonably delaying the termination of the conservatorship of Mrs. Smoker, thereby allowing her personal and firm's interests to adversely affect her professional judgment on behalf of the ward, in violating Disciplinary Rule 5-101(A). She is also charged with engaging in conduct prejudicial to the administration of justice which adversely reflects on her fitness to practice law, in violation of Disciplinary Rule 1-102(A) (1), (2), (5) and (6) of the Code.

The Respondent contends that no grievance was ever filed against her charging her with this delay and that she had no notice of this charge until the Verified Complaint was filed against her. Due

to this lack of notice, the Respondent claims prejudice because she missed an opportunity to question and depose Mrs. Smoker relative to this issue, prior to Mrs. Smoker's death.

We find, as did the Hearing Officer, that in July of 1977, a grievance was filed alleging that William Briggs engaged in professional misconduct. The Briggses were notified and they submitted a response. This resulted in the filing of a complaint against William Briggs in October, 1978. Because of the many matters involved in the grievance remained the subject matter of pending litigation, the Commission's attorney and James Stewart, William Briggs' attorney at the time, agreed to forego proceedings in the disciplinary case until the guardianship and will contest trials were over. On April 9, 1981, a voluminous new set of grievances were filed against William Briggs and the Respondent based upon

their actions in the guardianship and will contests. The grievance document was approximately 100 pages in length. The Respondent was notified on May 19, 1981, that the matter was being assigned to Attorney Hughes for investigation. There was a response from the Respondent and William Briggs of approximately two volumes. After further investigation and review, on September 10, 1982, the Commission, having determined that there is reasonable cause to believe the Respondent was guilty of misconduct which would warrant disciplinary action, by a unanimous vote, authorized the filing of a complaint against her. The complaint was filed on July 19, 1983. The Respondent states in her brief that a grievance was filed against her in July, 1977, but that it did not allege the delay charged hereunder. She further states that in July, 1978, the grievance was found to be without merit. There is nothing in the

sequence of events set out above which would support Respondent's contentions, and she provides no record which augments or contradicts the findings. We, thus, find this contention meritless.

In her second challenge to this charge, the Respondent insists that, due to a defamatory attack on her husband's integrity, her actions as his counsel were justified and simply constituted vigorous representation. She contends that because this charge fails for constitutional infirmity, she, in effect, is being punished for being the wife of William Briggs.

Her argument is untenable. The Respondent assisted William Briggs in a concerted effort to intentionally delay the termination of Smoker's conservatorship which they acknowledged should be terminated. At the same time the Respondent was fully aware of the personal interests being served by the delay, the extreme

emotional strain caused to the ward and that her actions served to frustrate the orderly administration of justice. In light of these considerations and the findings of fact, we find that the Respondent violated Disciplinary Rule 5-101(A) and 1-102(A) (5). We further agree with the Commission's position that the Respondent's conduct reflects adversely on her fitness to practice law and is in violation of Disciplinary Rule 1-102(A) (6).

The Respondent is also charged with violating Disciplinary Rule 7-102(A) (1) and 1-102(A) (1), (2), (5) and (6) by contesting, in bad faith, Smoker's final will, in order to preserve her family's interests. The Disciplinary Commission has challenged the Hearing Officer's conclusions that the Respondent's conduct did not constitute a violation under this charge. They contend that the Respondent should not be allowed to seek to recoup benefits

conferred upon her family by a will drafted by her partner/husband under circumstances constituting professional misconduct. Disciplinary Rule 7-102(A) (1) provides that a lawyer shall not:

> "File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

The Hearing Officer found that the will contest was motivated in part by retaliatory feelings and that the decision to proceed was made after an adverse determination in the guardianship proceeding; nonetheless, the Respondent believed that they could prevail in the will contest based on the issue of undue influence. Thus, the issue before us is whether Respondent's actions relative to the will contest were violative of the foregoing rule or otherwise

constitute conduct prejudicial to the administration of justice or conduct that adversely reflects on her fitness to practice law. Upon review of the findings, we agree with the Hearing Officer's conclusion that the evidence is not sufficient to support a finding of misconduct under the charge.

Lastly, the complaint charges that, as the law partner, spouse, assistant and legal counsel to William Briggs, the Respondent's actions, as set out above, constitute a course of conduct intentionally designed and calculated to damage her firm's former client and ward, in violation of Disciplinary Rule 1-102(A) (1), (2), (5) and (6). This charge restates the allegations and violations already addressed in the previous charges. We, therefore, find no misconduct under this charge.

Upon concluding that the Respondent engaged in misconduct, this Court must

now determine the appropriate sanction. In making such assessment, this Court examines the nature of the violation, the specific acts of the Respondent, the impact on the public, this Court's responsibility to preserve the integrity of the Bar and the risk, if any, to which the public will be submitted if the Respondent is permitted to continue in the profession or be reinstated at some future date. In re Stanton(1986) Ind., 492 NE 2d 1055; In re Duffy (1985), nd., 482 NE 2d 1137; In re Hailey(1985), Ind., 473 NE 2d 616. Despite her many years in practice the Respondent appears unable to make a distinction between the professional duty owed by her firm to the ward and the financial and emotional interests of the Briggs family. Throughout her involvement in this matter, the Respondent has been blinded by self interest and desire for vindication. While the Respondent may not have been the primary moving force in this

unfortunate episode, she did lose sight of her professional obligations. In light of the foregoing findings of fact and these considerations, we conclude that a period of suspension is warranted under the circumstances of this case.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Respondent, Florence Anne Briggs, is suspended from the practice of law for a period of not less than one (1) year beginning February 16, 1987.

Costs of this proceeding are assessed against the Respondent.

Dickson, J., not participating.

IN THE SUPREME COURT OF THE STATE OF INDIANA

IN THE MATTER OF FLORENCE ANNE BRIGGS

CAUSE NUMBER 783-S-262

HEARING OFFICER'S REPORT

The undersigned, the duly appointed Hearing Officer for the Supreme Court of Indiana in this cause, having heard the evidence of the parties and the arguments thereon and having been presented with legal authority for review therewith, now makes his report to the Court. Upon the matters presented the report is divided as follows:

I FINDINGS OF FACT UPON VERIFIED COMPLAINT Page 1
II: CONCLUSIONS OF LAW UPON VERIFIED COMPLAINT.....Page 25
III: FINDINGS OF FACT UPON PROCEDURAL AND CONSTITUTIONALISSUES.Page 26
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All matters relating to this cause in the possession of the Hearing Officer and all

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documentary evidence offered or admitted in evidence during the final hearing in this cause are transmitted to the Indiana Supreme Court herewith. In the event that a transcript or partial transcript of the evidence needs to be produced, the reporter will need to obtain the documentary evidence for production of SUCH A TRANSCRIPT.

I: FINDINGS OF FACT UPON VERIFIED COMPLAINT

1. The Respondent is a member in good standing of the Bar of the Supreme Court of Indiana, having been admitted to practice before such Bar in 1958. She also is duly admitted to practice law before the Bar of the Supreme Court of Kentucky.

2. The Respondent is engaged full-time in the practice of law in Carroll County, Indiana, and maintains an office in Flora, Indiana. The husband of the Respondent, namely William J. Briggs, is also an attorney and is the respondent in cause number 1078-S-235 before this Court and a

companion cause to this matter; at their law offices the Respondents Briggs operated from a common checking account and regularly presented themselves to participate in the representation of the other's clients, operated out of a common office, had common employees and sent letters on common stationery. Although they never formally had a partnership agreement or entered into any regular partnership or profit sharing arrangement, their personal finances were so interrelated that each benefitted from the practice of the other and that they annually attributed income one to the other in an unplanned method; that in addition they filed a joint income tax return but no partnership return; therefore, while no formal partnership structure exists, this Officer finds that they held themselves out to the public as a law partnership operating as Briggs

and Briggs during all relevant times herein.

3. That Respondent was aware that Mr. Briggs was representing Mary Bernice (Kate) Smoker commencing in the mid-1960's and through the events here described. She was an elderly widow, having been born in 1894, who was an ex-schoolteacher, a lifelong resident of Burlington, a small town in Carroll County, and something of a local character. She sought business as well as legal advice so that her representation was more time-consuming than normal, and she did not pay for her representation in any normal fashion but, instead, after paying a few minor bills normally, entered into an oral agreement with Mr. Briggs for life-time legal services at a fee of $10,000.00. Respondent was also conversant wth (sic) the terms of the will(prepared by Mr. Briggs) where Kate Smoker (who had no

children and no natural objects of her bounty) had favored Respondent's family members which (1) gave Mr. Briggs a specific bequest of $1,000.00 (2) established an educational trust with the majority of her estate specifying a Briggs child, Winston, as a major beneficiary of the trust for all of his college and post-graduate school expense, and named Respondent as Co-Executrix and as attorney for the trust. The unusual fee arrangement was generally acceptable because of the will provisions. Kate Smoker was not related to the Briggses, nor was she a close social friend, but she did regard Mr. Briggs as a valuable business advisor. She did, in fact, have significant business assets including 282 acres of farmland in Carroll County and, by the late 1970's about $150,000.00 in cash assets.

4. Kate Smoker had been treated for diabetes since 1966, for coronary insufficiency since 1967, and had suffered a heart attack in 1969. In the fall of 1976 the state of her health began to deteriorate. On October 22, 1976, she was admitted to St. Joseph Hospital in Kokomo for four days with a diagnosis of acute pulmonary edema, inferior myocardial infarction, hardening of the arteries, diabetes, glaucoma, severe peripheral vascular deficiency to her lower extremeties, and depression. She was released, lived at a friend's home and then her own home in Burlington for a few days, but the state of her health remained marginal. She was able to vote and she did continue to conduct some business. On November 9 she met with Mr. Briggs at her home and executed a codicil to her will, a nomination of him as guardian should she need, and formalized the life-time

services contract by written agreement and by funding $9,000.00 of it.

($1,000.00 was already provided by will) by joint certificate of deposit. She was readmitted to the hospital a few days later where, with a few days exception, she remained until mid-December, incompetent to handle her affairs and in badly deteriorating health; most visitors felt she was dying.

5. Upon the petition of Kate Smoker's first counsin(sic), a temporary guardianship was commenced on November 24, 1976, with Mr. Briggs as guardian and acting as his own attorney. He began marshaling assets for the guardianship and attempting to order business affairs. As he anticipated the need for large amounts of cash for the medical bills and a constant income for possible nursing home placement, he anticipated the need to change these practices in favor of cash

rentals of the farm ground. He was aware that she opposed this practice (it can lead to deterioration of farm improvements and of soil quality) but thought her current needs made it appropriate.

6. On December 13, 1984, Kate Smoker was discharged from the hospital. Her condition was still not good but was stable. Mr. Briggs had received the opinion of her doctor that her condition was irreversible and that she would require custodial care. Mr. Briggs drove her home and made arrangements for a suitable hospital bed to be placed there. He had also arranged for either nursing care , trained hospital volunteers or townspeople to always be available for assisting Kate Smoker. He was investigating nursing homes.

7. Thereafter she made a remarkable recovery and by January 11, 1977, when her doctor again examined her, he found that her mental impairment was "minimal" and her physical and mental problems were in a state of "remission". During this period of time she became aware of the guardianship, the restraints it placed on her abil-

ity to do business, and the altered farm management goals. On one occasion she professed no recollection of making the November 9 joint certificate.

8. Notwithstanding her recovery, the guardianship was made permanent on January 13, 1977 after hearing in the Carroll CircuitCourt. Kate Smoker advised the Court at the hearing in Mr. Briggs presence that she did not want him taking care of her as conservator, that she liked to run her own business, and that she did not want any conservator. Her doctor testified about his examination two days before but continues to opine that she was incompetent in the belief that her recovery was temporary. The Carroll Circuit Court by Judge Smock believed that a permanent conservator was advisable under the circum-stances and asured Kate Smoker that Mr. Briggs would try to follow her desires

with respect to the handling of her farming and other affairs.

9. During the next month, the long-standand close personal relationship between Kate Smoker and Mr. Briggs deteriorated badly. Kate Smoker was exceedingly unhappy that she was under a conservatorship (the word "chaffing" comes to mind). FurtherMrs. Smoker was use to being in primarycontrol of her own farming and monetary affairs, and she was exceedingly unhappy that Mr. Briggs was principally in control of her substantial cash assets and had negotiated a cash farm lease for a portion of her farms without her consultation. She was allowed to write checks for herself,however, and her nurses and custodians were told by him to take her wherever she wanted to go. During this period of time she began to consult with and complaint to Bobby Ritchey, a

local man then in his early 30's who had worked for her as a youth, who had resided with his parents on one of her farms, and who had been involved with her in cattle transactions; whereas Bobby Ritchey and Kate Smoker had previously been acquaintenances and occasional business associates (she probably thought of him like a hired man) they now became confidants and close friends.

10. One event which particularly incensed Kate Smoker at about the end of January involved her coming to the Briggs Law Office to obtain her lock box key. Mr. Briggs correctly refused to give it to her, but thoughtlessly displayed it to her commenting "you don't like authority, do you?" This greatly agitated and aggravated her, further destroying their relationship.

While the events thus described have uniformly involved Mr. Briggs only,

Respondent was fully aware of them and was present at the "lock box incident" described above. For all purposes here, however, Respondent had played an entirely passive role in these events.

11. Kate Smoker became increasingly disgruntled with the Respondent and in late January privately began conversation concerning the possibility of obtaining another attorney. She made inquiry of Kokomo attorney Alan Brubaker, a Burlington native, as to whether he would be willing to get her out of the guardianship. He indicated to her that he did not want to become involved in it and would not represent her in the matter although he could, if she wanted, to guide her to other attorneys. She later asked Bobby Ritchey to arrange an appointment with another attorney. He did so with R.

Adrian Marks, a Frankfort attorney with whom Ritchey was casually acquainted. Richey (sic) arranged for the initial meeting between Kate Smoker and Marks held on February 4, 1977 at Marks' law office. The interview lasted two and a half hours. She outlined her goals, as, first stopping Mr. Briggs from altering the basic nature and "complexion" of her farming operation and, second to get the guardianship terminated. Marks required her to be examined by two physicians. During this time it is safe to assume that she poured out to him her frustrations over no longer manging her own affirs(sic). Marks arranged for examinations by Dr. Beardsley, a Frankfort physician and Dr. Bowman, a Kokomo psychiatrist.

12. During the next days she was examined by Dr. Beardsley at his office. The doctor, not knowing that the report was

for court purposes , gave her a standard examination, took a history and otherwise conversed with her sufficiently to determine that she was pleasant, lucie, and well oriented. He believed her to be competent to manage her own affairs and he reduced his report to written form on February 9. Dr. Bowman examined her on February 7 at his office in Howard Community Hospital for seventy minutes. He believed her to be in the early stages of senility and diagnosed the condition as mild chronic brain syndrome. While she showed some confusion during the interview he believed her to be competent to manage her affairs and he reduced this to written form on that day.

Both doctors made their results known to Marks.

13. Mr. Briggs and Kate Smoker spent some time together on February 6 visiting a

friend at a nursing home. On the way home he reported to her that he had talked to Judge Smock about the possibility of his resigning because of the strain this was causing their relationship. He indicated to her that she could prevail upon a bank to serve as guardian. She indicated that there were too many new people at the bank and that besides, she didn't want a bank and that he should not resign unless or until a new guardian could be located. He remained entirely uninformed about her contacting other counsel or other doctors; they did discuss however that she was seeing her doctor weekly and that it was becoming apparent that he would have to change a mis-diagnosis.

14. Between February 7 and the end of February 9, the exact time and circumstances not being adequately described, kate Smoker did inform William Briggs that she had been in contact with

another attorney, namely R. Adrian Marks of Frankfort, Indiana. It is not clear that she described the extent of her interviews with him and it is also not clear that she had indicated that she had been seeing doctors for purposes of examination to end the guardianship; the best evidence would seem to indicate that she did not inform him concerning the doctors.

15. On Thursday, February 10, 1977, the first communication between attorney R. Adrian Marks and Mr.Briggs occurred. It was filled with the abruptness and animosity which has plagued any relationship between these attorneys including Respondent from that day to this. On that date Attorney Marks telephoned Mr. Briggs to indicate that he desired to come to the Briggs office to discuss matters pertaining to Kate Smoker.

Mr. Briggs indicated that he would be willing to have a meeting only if Kate Smoker were present. This difference becameheated and the conversation was abruptly ended by Marks hanging up. He did call later in the day to indicate he would not be coming.

16. Mr. Briggs learned that Bobby Ritchey was staying overnight with Kate Smoker on Friday night, February 11, so that he came to the house early Saturday morning, February 12. A heated discussion followed between Ritchey and Mr. Briggs concerning the care of Kate Smoker and what she would be doing later in the day. Ritchey had anticipated taking her to a birthday party that evening and possibly having her stay over night at the Ritchey home that night. Mr. Briggs looked upon that unfavorably at the time and further discussions resulted; the tone of the testimony makes clear that a serious confrontation between two

stubborn men occurred here. Neither Ritchey or Mr. Briggs would leave before the other left so that eventually they left simultaneously. Mr. Briggs called Kate Smoker later in the day and indicated to her that it would be satisfactory for her to go to the birthday party and in fact she did accompany Ritchey and his family members to a birthday dinner at a Frankfort restaurant that evening. Later that day Mr. Briggs submitted two petitions to Judge Pro Tem, Judge Smith (Judge Smock was undergoing serious health problems at this specific time and was in the process of resigning;) Judge Jeffrey R. Smith was not the regular Judge of the court although he was the only Judge available in Carroll County at the time; the record in the legal proceedings suffers during this period of time because some of the documents here after referred to were delivered directly to him at his

law office and were file stamped at later times). The petitions (1) that the Court issue a temporary restraining order, restraining certain persons particularly including Bobby Ritchey and his family members from interference with his relationship with his ward and (2) objecting to the filing of any papers or pleadings allegedly signed or authorized by the ward and further seeking a protective order against his production of any documents should such allegations be made. Judge Smith was well aware of these requests at tne time and subsequently made a record of overruling them.

17. On Sunday, February 13 a result of the scene the previous day and her frustrations with the guardian and the guardianship, Kate Smoker contacted Attorney Marks directing him to immediate action for purposes of terminating the

guardianship. He in fact interviewed her twice during that day, first whereby she requested immediate action and they discussed the nature of what it would be whereupon he prepared a petition for removal and second at her home in the presence of Bobby Ritchey where he read through the petition to Remove with her reviewing the document line by line and having her or her and Ritchey initial the specific facts and allegations therein that they could document.

18. On Monday, February 14 Attorney Marks presented the Petition to Remove to Judge Smith who scheduled the matter for review for Friday, February 18. Judge Smith indicated to Attorney Marks at that time that the petitions described above were submitted on the preceding Saturday.

Mr. Briggs receipt of the Petition to Remove evoked anger and emotions in him which have not subsided. His reaction as

he described it when reading the petition was as if someone had "taken a strap and belted him in the face" and that he felt required to oppose and fight the allegations against him because of their nature. Further, he felt that Kate Smoker had deceived him by not revealing to him sooner her visits to Doctors Bowman and Beardsly.

19. On Friday, February 18, 1977, Respondent together with Mr. Briggs, Attorney Marks and his associate attorney in this cause, Samuel Power, met with Judge Smith in a pre-hearing conference. As a result of that conference Judge Smith ordered written reports from Doctors Bowman, Beardsly and Wagoner concerning Kate Smoker's physical and mental condition to be submitted as part of the record in the conservatorship cause. While returning home following such hearing, Mr. Briggs engaged in a lengthy

consultation with Respondent concerning the advisibility of filing his Petition to Terminate the conservatorship on the basis of Kate Smokers now apparent competency; he had prepared such adocument and took it to the conference but had not filed it or displayed at the conference. He eventually concluded that the filing of such a document was appropriate so that he returned to Delphi and filed it. It includes his statement without

reservation that the conservatorship should be terminated, stating reasons therefor, and referring in his petition to the findings of Dr. Beardsly and Dr. Bowman. He noted that because of the conservatorship Kate Smoker was extremely unhappy and had a "frantic feeling" and further noted, "Until the conservatorship

is terminated Mrs. Smoker will always be unhappy and will not be free from the influence, ministrations and manipulations of others." This event marks a change in the participation level of Respondent in this matter, perhaps such a change is the natural consequence of their office division of labors which leaves Respondent virtually all of the trial work. She had reviewed the Petition to Terminate, although Mr. Briggs had drafted it, and, with increasing frequency she drafted or reviewed various letters, pleadings, or documents in the Smoker matter. Ironically, she counseled against his filing of the Petition that day.

20. Within the next days Kate Smoker indicated a desire to Attorney Marks to prepare a new will. She had mentioned this in her initial interview but he refused to even have a discussion with her about it until she obtained competency examinations. Thereafter, he did have a

lengthy interview with her about what she wanted. He did not have access to the will prepared by Mr. Briggs some years before with the educational trust. He had to rely upon her memory for that information because she did not wish to ask Mr. Briggs for a copy of it. When she described the nature of the trust that she desired, he approved of such a bequest noting that he had been aware that such an arrangement could be set up without cost by the Indiana University foundation and could be established exclusively for the burlington community.

She noted, however, that she was now not going to participate in such a program noting "that the whole idea is now spoiled for me" and that now she desired to make a series of specific bequests, to make the bequests of a modest amount of farm land. to Bobby Ritchey , and that the residue of her estate be divided equally between

trusts for the Burlington Methodist Church and the Burlington Cemetery. In fact, Attorney Marks prepared that will for her and she executed it before witnesses on February 23, 1977. Five days later she added a one page codicil, adding two quite modest specific bequests. Except for herself and Marks, the other actors in this drama, particularly including Bobby
Ritchey, were not aware that she had made a new will for quite some time.

21. After the filing of the Petition to Remove by Attorney Marks and the Petition to Terminate by Mr. Briggs, Mr. Briggs with Respondent's assistance began delaying and resisting action on these petitions. On February 23, Mr. Marks sent a letter to Mr. Briggs agreeing to the granting of the Petition to Terminate, and submitting a suggested form of decree for the purpose of ending the guardianship.

Mr. Briggs did not answer the letter. About one week later, Attorney Marks telephoned Mr. Briggs as to the possibility of such an agreed termination order. He answered Marks by telling him that they would be able to talk when Marks "got the animosity out of his heart." Marks indicaates this his reply was "quick and pungent." A few days later Mr. Power, Kate Smoker's other new attorney, called Mr. Briggs to discuss action on the Petition to Terminate. Mr. Briggs refused to agree to the granting of his own Petition to Terminate. In a letter written on May 2, 1977, to Special Judge Munro who had since qualified in the guardianship, Mr. Briggs informed the special judge that he had informed Mr. Power that "...before, I myself, would agree to any order of any nature, including a dismissal of their Petition to Discharge, etc., there would have to be a finding that certainly I had NOT

mismanaged the funds of Mrs. Smoker in any way."Respondent drafted this letter for Mr. Briggs' signature.

22. Judge Munro was selected and qualified on February 28, 1977, and he set a hearing to be held on all pending petitions on April 19. Between March 9 and March 15, the three physicians filed their written reports with the court in which each of them affirmed that Kate Smoker was of sound mind and capable of managing her own affairs. On April 12, failing to get an agreed entry signed by Mr. Briggs to his own Petition to Terminate, her attorneys filed a reply to the Petition to Terminate that admitted the allegations that the guardianship should be terminated. Shortly before the scheduled April 19 hearing, the Briggses discovered that they would have to be in Washington, D.C. on other legal business,

and the court granted a continuance and rescheduled the hearing for May 11.

23. On April 19, Kate Smoker's counsel filed a Motion for Summary Judgment on the Petition to Terminate, pointing out that the pleadings showed that the parties and all of the physicians were in agreement that Kate Smoker was mentally competent. On May 6, the court entered an order limiting the hearing on May 11 to the issues raised by the Petition to Terminate and also informed counsel that, since by agreement the physicians' reports were part of the record, the Court would take judicial notice of them and it would not be necessary for any party to call any of them as a witness at the hearing.

24. On May 11, Mr. Briggs filed his "Objection to Court Order", objecting to the reception of the doctors' reports and to limiting the hearing to his own Petition to Terminate. On the same date,

Mr. Briggs filed his "Affidavit and Response of William J. Briggs Conservator to Motion for Summary Judgment." In this pleading, he argued strenuously that the granting of a judgment of his Petition to Terminate, without also hearing the Petition to Remove, would do "irreparable harm" to him because the Petition to Remove "has cast doubt on the character of William J. Briggs by innuendo." Respondent believes Mr. Briggs to have prepared these Objections and theAffidavit and Response, but she believes that she reviewed them and concurred in them.

25. On May 11, the Court proceeded with the hearing on the Petition to Terminate, and all of the evidence was heard thereon except that of Dr. Wagoner. Since Mr. Briggs wished to call Dr. Wagoner as witness and he could not be present on May

11, the Court, on Mr. Briggs' motion,

granted a continuance to May 26 to permit Dr. Wagoner to testify in person. On that date, following his evidence, the guardianship was terminated by the Court.

26. During the period of time from the filing of Petition for Removal by Attorney Marks and the ultimate return of control of her property to Kate Smoker, Kate Smoker was subjected to constant fits of distress, anxiety, and worry. The record of this case is replete the examples of individuals stopping by her home so(sic) see or check on her and finding her in various stages of emotional display, concerned over property control, or upset because of some specific situation that had occurred. The most serious example is presented by the testimony of attorney Alan Brubaker who received a garbled and near hysterical call from her on one occassion(sic) to stop by to talk with her. Shortly thereafter when he arrived

at her home, he found her to be sobbing uncontrollably, literally tearing her hair out of her head, and incapable of speaking sufficiently to even explain the cause of her distress. He described that she would cry for 9 to 10 minutes and then wail "how could he do this to me?" and relapse into a new fit of despair. After three to four hours that evening, he was able to get her settled down so that she was no longer in such a emotional state but he never was able to conclude the event that had caused this display.

Throughout this period of time by far the vast majority of these emotional upsets werethe result of events concerning Mr. Briggs and his control over her property but it must be indicated that the entire situation was the cause of her upset, that is the continuation of the guardianship and her own inability to gain control over her property. She was

terribly embittered over the continuance of April 19 and May 11.

This Officer would be hard pressed to improve upon the observation of Judge Munro: "The termination of a conservatorship, where three physicians unanimously agree that the ward is restored to competence, normally would be a simple and routine matter. While the decision must be made by the court exercising independent judgment, even if all parties are agreed, in a normal case it is something that would be done routinely and promptly as soon as the fact of competence became apparent. In the matter at hand, (Mr. Briggs) treated the entire matter as an adversary proceeding," apparently believing that he would face allegations of the improper creation of the guardianship if he simply went on record as agreeing to end it. He did so fully aware of the emotional upset being

caused to her and for purposes ultimately designed for his own benefit, namely, to protect his own reputation. While it must be noted that Mr. Briggs was the lead attorney in deciding this course of action, it must also be noted that Respondent counseled him to pursue this wrongful course of action and assisted him in its perpetration.

27. Immediately following the granting of the termination of the guardianship, Kate Smoker executed another codicil to her 1977 will in which she reaffirmed its terms as well as the terms of the codicil made a few days thereafter.

28. Judge Munro's termination order of May 26 directed specifically that Kate Smoker could take over her business affairs immediately and receive her business mail immediately , that Mr. Briggs was to file a written final report within two weeks, that $2,000.00 was to be

transferred to Kate Smoker for her immediate use, that her Will, tax papers and other papers would all be made available to her at the time that final report was submitted. The date of June 9 became a date of substantial importance to Kate Smoker; that was the date she was to receive all of the items not immediately delivered. The date was apparently of less significance to both the Respondent and the co-respondent however, Mr. Briggs was expending substantial effort to filing a written final report, but had no plans to deliver documents and other items that date. In fact, Attorney Marks came to the Briggs law office to pick up certain items armed with a power of attorney from Kate Smoker and a specific directive from her to deliver papers. Mr. Briggs was absent, working on another matter and the result was an angry confrontation between Marks and Respondent. Marks arrived at about

1:00 p.m. but Respondent refused to talk with him unless Kate Smoker was present; Marks did not leave, so Kate Smoker was telephoned. She confirmed her written directives to allow delivery which Marks delivered to Respondent, the Respondent then indicated that she didn't trust him and didn't think she should give the documents to him. An angry exchange took place of the the $2,000.00 which hadn't been paid yet. Marks also indicated that Respondent and co-respondent were bothering Kate Smoker, that they were no longer her friends of attorney and that Mr. Briggs was no longer the guardian so that any and all contact by them should be through Marks.

Respondent indicated that Kate Smoker was their friend and that they would contact her when they pleased. In spite of this acrimonious exchange, numerous records and

documents were delivered that date. Specifically, three items were the ultimate causes of further friction (a) Mr. Briggs understood that the $2,000.00 was to be made available to Kate Smoker for payment of quarterly estimated taxes, not as operating funds, this money was available before June 15, but he gave it no priority; (b) numerous business papers including checking account records were not timely delivered; no doubt the sheer volume of materials had something to do with that but it caused Kate Smoker further distress (c) the lock box key was not returend(sic) as Mr. Briggs desired a witness to the transfer of its contents but took no steps to arrange it; Attorney Marks suggests that Mr. Briggs was simply holding the certificates hostage to secure a favorable resolution of fees issues and indicates that Mr. Briggs told him "We'll talk about keys

after we settle our fees;" Mr. Briggs heatedly denies any such statement). The lock box key was delivered August 2, 1977. It is clear that Mr. Briggs took no special steps to return the key, a fact of special significane(sic) because of the earlier "lock box key" incident. This episode again further embittered Kate Smoker about Mr. and Mrs. Briggs and their motives.

29. With the filing of the Guardian's Final Report, Mr. Briggs objected to being required to file a claim for services as conservator or as an attorney. He argued in his objection that he had undertaken these servicesas part of the life time contract that he believed himself to be under with Kate Smoker. These objections were overruled and ultimately he was directed to file a record of his time expenditure in the case and a statement of account. His filing in this regard stated

that his service as conservator and Mrs. Briggs' services as attorney when computed upon hours of service alone were reasonably worth the total sum of $17,585.00.The Guardianship was opened on a preliminary basis from November 24, 1976 to January 13, 1977 and on a permanent basis from January 13 to May 26, 1977, a total period of 6 months and 2 days.

Total assets consisted of 282 acres of farm land and cash assets of approximately $150,000.00. Total income during this period of time was $5,893.68 and total expenditures were $16,019.14. The record well reflects that the ultimate goal of Mr. Briggs was not to seek that amount of recovery for fees but was instead to assure his life-time services contract and the payment of the $10,000.00 under it.

Certainly his prayers for relief were in the alternative but his efforts supported by Respondent were bent upon proof of the

validity of the contract.

30. Lengthy and acrimonious proceedings toward final hearing upon the closing of the guardianship followed. Allegations between Mr. Briggs and Attorneys Marks and Power followed which included an effort to bar the Briggses from communicating with Kate Smoker and more significantly a filing by Attorney Marks of certain pleadings in camera before Judge Munto which later became the basis of a defamation counter-claim by Mr. Briggs against Kate Smoker, Adrian Marks and Samuel Power, individually. During this period of time both Mr. and Mrs. Briggs also became aware that Attorney Marks, later supplemented by Attorney Power and Kate Smoker, had filed a complaint before the Disciplinary Commission which ultimately gave rise to the companion case against Mr. Briggs. Ultimately all of the matters scheduled for conclusion as part

of the guardianship final report including (a) final determination of Mr. Briggs' statement of services as attorney and conservator, (b) ward's preliminary objections and final objections to the report (c) Mr. Briggs' claim for damages because of defamation, and (d) a claim for personal injuries and damages against Mr. Briggs and by the ward were all scheduled for hearing to commence December 3, 1979.

31. At the August 2, 1977 pre trial conference, Respondent filed a written Motion to Withdraw from represenitng Mr. Briggs. She indicated to him at that time that she was too close to the case and that she had lost her objectivity; this Motion was accompanied by a request that her replacement be compensated out of guardianship funds. Judge Munro did not approve this request for payment; the record available to this Officer does not show whether the Motion to Withdraw was

denied or simply not ruled upon . In any event Respondent remained active in the case. Mr. Briggs then employed Delphi Attorney Joseph T. Ives (known as Tom) who entered his appearance on behalf of Mr. Briggs in the guardianship matter and promptly began participation in the disciplinary action as well.

32. That during the period of time from May of 1977 to 1979, Kate Smoker managed her own affairs and was not under guardianship. There is no indication during that time that she was unable to execute a new will or otherwise modify the will that she had made in 1977. During that time she remained close to Bobby Ritchey as well as other former friends but did not remain friendly with Brigges(sic) As Dr. Wagoner had predicted, her health remained on a gradual downhill course. She returned for four more visits with Dr. Bowman, at first

to ventilate her frustrations with the guardianship, with Mr. Briggs and with the whole legal process. Other visits were more in the nature of examinations for a competency determination as a witness. Her health did not deteriorate to the levels it had reached in November of 1976, but Dr. Bowman's records reveal a gradual erosion of her alertness and increased symptoms of senile dementia.He saw her last just a few weeks before her death and she was not sharp.

In anticipation of this sequence, her deposition was taken for Mr. Briggs' disciplinary proceeding on November 22, 1977; the Respondent was present for it. Respondent also took Kate Smoker's deposition for use in the guardianship case.

33. Mary Bernice Smoker passed away on November 21, 1979, approximately 2 weeks prior to the commencement of the Court

trial scheduled on the final report on her conservatorship. (34) On the following Monday, November 26, 1979, Mr. Briggs in consultation with Respondent filed sworn objections to the probate "of any will (or codicil) of Mary Bernice Smoker subsequent to the date of February 24, 1970..." pursuant to statute. Such objections resulted in the impounding of Mrs. Smoker's 1977 will and codicil when they were presented thereafter for probate. Mr. Briggs' and the Respondent's stated purpose in filing such an action at that early juncture was to obtain the appointment of a "neutral" administratoir of the estate, preferably a financial institution, who would not hire Marks and Power as their counsel and who would, therefore, be more amenable to settlement of the pending claims. Judge Donald Myers, then regular judge of the Carroll Circuit Court, approved the Clinton County

Bank and Trust Company of Frankfort, Indiana, as special administrator; this was the representative named in the decedent's 1977 will. This administrator promptly hired Marks and Power as counsel.

35. Mr. Briggs' and Respondent's ultimate purpose in contesting the 1977 will and codicil was to preserve his own claim and all of the family benefits which the prior will of 1970 contained. Mr. Briggs undertook this contest fully aware of the existence of a disciplinary action pending against him. While it is safe to assume that Mr. Briggs and Respondent were aware that his filing could well delay the guardianship final hearing (it did not) and that it would delay the ultimate determination of his disciplinary proceeding (this file contains correspondence that a disciplinary trial would await the results of the guardianship hearing) and while it is

further safe to believe that retaliatory filings against Marks and Power controlling the final determination of the Smoker Estate did at least cross their minds, the ultimate decision to prosecute a will contest, no doubt made after an adverse determination in the guardianship, was grounded in the appropriate litigant's decision that he believed he could win the claim. These considerations of the "winability" of the case and the resk of further disciplinary filing appear to be the major areas of discussion as to whether to proceed.

The decedent's competence was the time of the execution of the 1977 will and codicils was never challenged. The entire lawsuit was fought over the issues of the use of under influence upon the decedent and whether the 1977 will was a product of such influence. Respondent correctly believed that a jury would be instructed

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upon "undue influence" essentially as follows:

> False statements and accusations to a testator concerning the objects of the latter's bounty with the intention and effect of alienating her affections and causing her to make certain testamentary dispositions of her property may be a circumstance to believe will void for undue influence. Attacking the reputation character of a person may be the means through which undue influence or fraud invalidating a will is perpetrated. Undue influence may consist in arousing bitter feeling that would be unwarranted if the whole truth were known; such influence may be achieved by initiating half-truths so directed that they will, in all probability, reach the person to be affected, to the injury or prejudice of another person, and once the bitter feeling has been aroused, it can be kept alive and the memory of it sharpened and even magnified by repetition.

Factors in this case which led Mr. Briggs andRespondent to believe that they could well prevail upon this tate of the law were (1) that Bobby Ritchey, the individual who had taken decedent to Marks' office, had benefitted more from this will than any other person, going from a $2,000.00 specific bequest to a 92 acre

farm (2) the pattern of the previous wills she had drafted had always been to create an educational trust, even before she had met Mr. Briggs but no educational trust was left in the 1977 will (3) the church and the cemetery had received modest specific bequests before, but nothing in scope like the residue of the estate (4) Dr. Wagoner had already provided testimony that from February 3, 1977 to May 26, 1977, that she could be unduly influenced. The Respondent also argues that other items in the will which reflect that it was hurriedly prepared buttress this position, those arguments are much less convincing.

36. Attorney Ives never significantly participated in the guardianship case. He commenced active participation in the disciplinary matter for Mr. Briggs, but after a period of time it became clear that counsel in Indianapolis would be

better placed to pursue that matter so that Mr. Briggs had retained Attorney James Stewart to represent him in the disciplinary matter.In the guardianship case attorney Ives attended a few days of trial but was not active in the matter and gradually faded out of it. He had no involvement at all in the will contest. Attorney Stewart had no participation whatsoever in the guardianship case. He consulted with Mr. Briggs and Respondent about the advisability of filing the initial documents commencing the will contest and, after the guardianship decision, whether to proceed with it to trial. His chief considerations appear to have been the likely impact upon the pending disciplinary matter. Accordingly, Respondent became lead counsel at the guardianship trial and was again lead counsel in the will contest.

37. In the guardianship case, it was

clear that Mr. Briggs, her law partner, would be the chief witness, at least for his side of the case. Respondent was also briefly called as a witness. On the other side, Attorneys Marks and Power were also called as witnesses and testified extensively. The matter was a trial to the Court before Judge Munro. There is no indication that anyone gave a moments' thought to the propriety of these particular attorneys' participation when they knew they would be witnesses.

38. Trial on the guardianship final report and the related matters thereto was held over a period of 30 trial days from December 3, 1979 to August 7, 1980. At the conclusion of that proceeding Judge Munro rendered his determination of the matters presented on November 5, 1980, as the Court of Appeals, Second District reviewed that matter by decision of August 9, 1983 cited at 452 N.E. 2d 989

(rehearing denied, transfer denied). His determinations are here summarized as follows: (a) the final report was approved in all respects except for guardian's fees and attorney fees, all of which were denied based upon apparent conflict of interest; (b) all claim by Mr. Briggs to the $9,000. Certificate was set aside and the underlying contract for life-time legal services was rescinded upon a theory of undue influence; (c) the Smoker's administrator's claim against Mr. Briggs for misfeasance in the management of estate assets was denied upon the theory that she always had funds to do as she wished; included in her argument here was an attempt to recover for injuries from psychological abuse and emotional strain, but the judgment was that her death rendered any issue here moot; (d) the defamation claim by Mr. Briggs was upheld but no damage had resulted

therefrom; ultimately a $1.00 award was made on that claim; (e) fees for $25. 00 were awarded for the time period between the signing of the life-time contract and the guardianship formation in November 1976. The Court of Appeals set aside the $25.00 award and ordered appellate attorney fees paid.

39. The will contest case was scheduled to commence in late November, 1980, a matter of days after Judge Munro's decision was handed down.40. Mr. Briggs and Respondent were the attorneys of record for plaintiff in the will contest; in all respects Respondent acted as lead counsel during the trial, knowing that her partner Mr. Briggs would be a most signficant witness. The beneficiaries of the 1977 will were variously represented by Attorney Huffer, then Attorney Vaughn , no one ever explained the trial role of Attorney Layden; Attorney Marks, the

attorney for the temporary administrator described his participation with defendants as "of counsel"; he was also a key witness of course. The will contest was tried before a jury.

41. Contemplation of the propriety of Respondent's participation begins with DR 5-102(A)

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm; if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

exception (4) provides:

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Respondent has consistently argued that her participation fit the exception of (4); no showing of distinctive value was here made however. The problem here is that different considerations apply where the attorney is a witness-advocate as compared to a litigant-witness-advocate. The ultimate justification for the disqualification rule is that the public might think that the lawyer is distorting the truth for the sake of his client. A second rationale is that a lawyer-witness could vouch for his own credibility in summation before a jury-- a powerful means of support. These same concerns disapper(sic) when the attorney is also an interested party in the case. Any belief that his testimony is distorted suddenly becomes not different than for any other party; all parties' testimony have to be examined for self-interest and a litigant whose occupation is lawyer will be no different

than any other litigant. Also, where Respondent is doing the arguing, there need be no concern that Mr. Briggs could unfairly vouch for his own creditility; she characterizes the evidence, not he, so that no first person testimony can be reinforce. The concerns here are simply not the same. See International Electronic Corp. v. Flanzer, (1975) 527 F 2d 1288.

Let's start again. It is central to our system of justice that a layman can represent himself; can an individual lose that right simply because he is a lawyer? If Mr. Briggs is free to represent himself as we generally recognize any person should be, is his partner barred from representing him? The clear answer under typical circumstances is "No," a partner could no more be construed as improving the credibility of the litigant-witness-lawyer than he could that

of any other client. Here, however, the partner is not only the business partner of the advocatebut is also the spouse, the marital confidant, the sharer of personal economic benefit, and for our purposes the unquestioning supporter and believer in the litigant-witness-lawyer. Does this create a problem of improving the credibility of the attorney's testimony that is a greater problem than the normal partner's situation? It is the considered opinion of this Officer that the problem is made somewhat different by the marital relationship since a spouse may well be in a stronger position to advocate the credibility of their spouse-business partner than mere business partners would be, however this Officer also believes that any advantage gained by such ability is usually offset by the apparent self-interest in such an argument. In the end here, Respondent's final argument

cannot be said to mislead a jury where they are aware of the relationship, her argument cannot be more or less strong that(sic) that of Mr. Briggs arguing directly.

Accordingly, in the guardianship trial before Judge Munro, no misleading or improper conduct appears to this Officer by virtue of the Respondent's trying this cause for Mr. Briggs. With somewhat less assurance, the same can be said of the will contest tried to a jury.

42. On October 29, 1980, Respondent had written a letter to opposing counsel of record regarding a desire to discuss settlement of the Will Contest using as a frame of reference the attorney's fees and other defense costs which the Smoker estate would likely expend in all phases of the litigation. She undertook to advise Attorney Huffer, one of the opposing counsel, in her letter that

Huffer was representing parties with conflicting interests since he represented specific legatees as well as residuary legatee, the latter parties being the parties ultimately charged for defense costs. She told Huffer in her letter that the facts concerning the different interests of his clients should be communicated to and clearly understood by Huffer and the Boards which govern the residuary legatees.

43. On November 5, 1980, Charles R. Vaughn, an attorney in Lafayette, Indiana, entered his appearance in the Will Contest case for numerous defendants, including the Burlington United Methodist Church and the Burlington Cemetery Association.

44. On November 8, 1980, Respondent conveyed to Charles R. Vaughn a written offer to settle the Will contest and the Respondent's claim in the Smoker Estate. The settlement offer proposed that the

contestants be paid the sum of $29,250.00 by the Smoker Estate, such sum being three-fourths of the attorneys' fees which she estimated the Smoker Estate woyuld expend in further defense of the Will Contest. The settlement offer concluded with an admonition by Respondent that, since it was her opinion that Mr. Vaughn was representing defendants in the Will Contest who had conflicting interests, Mr. Vaughn had an obligation to fully and completely discuss the settlement offer with all parties represented by him. Because of the language of a letter sent to the Church Board, copy to Respondent and Mr. Briggs, that their offer contained "nothing new" Respondent felt that further pre-trial steps were necessary to assure that the offer was fully conveyed.

45. On November 10, 1980 she telephoned the Special Judge in the Will Contest, Robert Leirer Justice, (then a practicing

attorney, now regular Judge of the Cass Circuit Court) and inquired of Judge Justice whether she could contact persons associated with parties defendant in the Will Contest to determine if her settlement offer had been conveyed to such parties by their counsel.
Judge Justice informed her that, in his opinion, she ethically could contact such persons
provided that they did not hold "decision-making" positions with a party defendant. None of the counsel representing the defendants in the Will Contest were privy to the telephone conference above described between Respondent and Judge Justice, but Mr. Briggs was well aware of such conference and its content.

46. Shortly thereafter, Mr. Briggs telephoned Reverend Arthur A. Schenck, a retired United Methodist pastor for whom Mr. Briggs had drafted a will in 1971. Reverend Schenck was a resident of Burlington, Indiana. By virtue of his

residence and retirement status, Reverend Schenck was a member of the Burlington United Methodist Church and a member of such church's Charge Conference and Administrative Board, the bodies within such Church that had the decision-making power with respect to the Church's participation (if any) in the settlement of the Will Contest. Mr. Briggs asked Reverend Schenck to come to the Briggs's law office in Flora and Reverend Schenck obliged.

47. Reverend Schenck met at the Brigg's(sic) law office with the Respondent and Mr. Briggs. Mr. Briggs advised Reverend Schenck that he wanted to be certain that a settlement offer he had made in the Will Contest had been communicated to the Church. He further told Reverend Schenck that he wanted this settlement offer presented to the Church Board but that he could not present the

offer himself because the Church's attorney, James R. Huffer, had forbade such a presentation. Mr. Briggs further told Reverend Schenk (sic) that the offer had to be presented by someone who was not a member of the Church Board, whereupon Reverend Schenck advised the Briggses that he was an ex-officio member of the Board. Mr. Briggs informed Reverend Schenck that he had a claim for $17,000.00 for services performed for Kate Smoker and tnat he would dismiss the willcontest if he was paid $29,000.00. Mr. Briggs requested Reverend Schenck to ask the pastor of the church, Reverend Ralph Karstedt, to appoint someone who was not a member of the Board to present the settlement offer to the Board. This entire conversation occurred in Respondent's presence and with her knowledge, consent and active assistance.

48. Reverend Schenck promptly went to see

Reverend Karstedt at the Burlington United Methodist Church. Reverend Schenck informed Reverend Karstedt that Mr. Briggs had contacted him about the Will Contest and that Mr. Briggs wanted the Church to be aware of his settlement offer and the amount of the settlement offer of $29,000.00. Reverend Schenck asked Reverend Karstedt to see to it that the settlement offer was conveyed to the Administrative Board and told Reverend Karstedt that he had been told by Mr. Briggs that the Church probably would save money by accepting the settlement offer and that such a settlement would be to the Church's advantage. Reverend Karstedt informed the Chairman of the Administrative Board of the settlement offer, and the two of them felt that they had no desire to compromise the claim as a matter of principle; they rejected the request conveyed by Reverend Schenck to

take the matter before the Administrative Board.

49. An eleven day trial to a jury of the Will Contest ensued with Respondent acting as lead counsel for plaintiffs. After eight hours of jury deliberation a verdict against Mr. Briggs was returned, effectively upholding the 1977 Will. Judge Justice has indicated that he believes the issues presented provided a fair jury question and that he believes he would not have set aside a verdict for plaintiffs had that been the decision.

II

UPON VERIFIED COMPLAINT

Upon the issues here presented, this Officer now concludes as follows:

50. That all findings herein are made based upon a "clear and convincing" standard of evidence, as to issues raised by Respondent as affirmative defenses, findings thereon are also based upon the Commission overcoming the defense by "clear and convincing" evidence.

51. That Respondent, by assisting Mr. Briggs to unreasonably delay the termination of Mrs. Smoker's guardianship allowed her personal interests to affect the exercise of her professional judgment in violation of the Code of Professional Responsibility.

52. That Respondent had probable cause to believe that her client, Mr. Briggs, could prevail in litigation to set aside the 1977 Will and for enforcement of the 1970

Will. Her counseling to him to proceed with such trial was therefore supportable under the appropriate criteria and was not misconduct.

53. That Respondent participated in unreasonably communicating a settlement offer to another, knowing them to be represented by counsel in violation of the Code of Professional Responsibility.

54. That as this Officer understands the purposes and rationale of D.R. 5-102 (A), Respondent did not violate the Code by her participation as counsel on behalf of Mr. Briggs.

III

FINDINGS UPON PROCEDURAL AND CONSTITUTIONAL ISSUES

The Respondent has challenged the procedures of the Indiana Supreme Court Disciplinary Commision generally and as applied to this case as violating her constitutional rights. These issues have been developed as follows:

A. Did the delay in bringing this to hearing deprive the Respondent of her fair opportunity to defend herself? This has been presented as (a) because of the death of numerous witnesses depriving her of the effective use of the subpoena power and (b) the generally recognized prejudice attached to delay arising from faded memories, lost evidence, living with the uncertainity of the result, etc.

B. Was the Respondent denied equal protection of the law in that she was selectively prosecuted while other malfeasors herein were not?

C. Was the Respondent denied due process and the equal protection of the laws by having her fact-finding hearing joined to the fact-finding hearing in 1078-S-235 wherein the

Respondent was her law partner and her husband.

D. Was the entire proceeding conducted to deny her the protection of procedural due process of law; stated another way, are the Rules of Procedure for these proceedings as outlined in Admission and Discipline Rule 23 fundamentally fair?

E. Are the nature of the proceedings together with the potential sanctions a cruel and unusual punishment?

Upon such issues the Court now makes the following findings of fact:

55. That the Disciplinary Commission received a complaint letter from Attorney R. Adrian Marks on July 8, 1977, followed by the submission of a grievance dated July 20 and received July 22, 1977 signed by Mary Bernice Smoker, attorneys Samuel Power, and Marks alleging professional misconduct by the William J. Briggs.

56. That Sheldon Breskow, Executive Secretary of the Indiana Supreme Court Disciplinary Commission reviewed the grievance and determined that it contained

a basis for further investigation to determine if misconduct had occurred; that he set in motion further investigatory procedures within the Disciplinary Commission which included notification to the Briggses that an investigation was under way, the issues of the investigation, and invited by them any response that they wished to provide concerning the investigation; that in fact, they did present one response which would be considered the equivalent of a general denial in regular pleading practice, that the Executive Secretary's staff replied that that was not the kind of response that they were seeking but they were instead allowed the opportunity to provide a factual response as to whether any cause should be commenced; the Respondent did, acting on behalf of Mr. Briggs, in fact provide a substantial response including submission of vast

amount of materials on December 5, 1977.

57. This procedure is the standard procedure by which grievances are filed and the Executive Secretary commences and investigation towards a filing; aside from the general denial nature of Mr. Briggs initial response and the request for a further filing, Mr. Breskow has no specific recollection of any procedural irregularities in the initial stages of the grievance against Mr. Briggs. Respondent fully participated with Mr. Briggs through the initial stages of the entire matter, acting in a capacity of counsel or co-counsel with him.

58. The grievance against Mr. Briggs together with results of further investigation and the response was presented to the Disciplinary Commission and, as is normal practice, was assigned to two members for specific review and report, the two members in this cause

being Commission members Jeannie Miller and G. Daniel Kelley, Jr.

59. That by vote of the Commission on July 14, 1978, the filing of a disciplinary action against Respondent William Briggs was decided and was actually filed before the Supreme Court of Indiana on October 24, 1978.

60. Representing the Commission, Mr. Briggs case was first assigned to Commission attorney David Coppenhaver. He left the employ of the Commission within a few months and the case was reassigned to Commission attorney David Hughes who has represented the Commission through the balance of Mr. Briggs' case and throughout this matter.

Initially representing Mr. Briggs was Respondent acting in conjunction with Mr. Briggs. Fairly early in the process, however, Mr. Briggs obtained the services of Delphi attorney Thomas Ives to

represent him in this matter; Ives was representing Mr. Briggs through the time of Mary Bernice Smoker's evidentiary deposition taken in November, 1977, (Respondent has complained that although Ives had ample notice of that deposition, she and Mr. Briggs had less than 24 hours notice of it); as the proceeding developed it became clear that an attorney located in Indianapolis would be better placed to pursue Mr. Briggs representation and therefore Attorney James Stewart was hired to represent him. Stewart, together with his law partner Richard Gilliom thereafter represented him until Stewart's death in June, 1983. Some months thereafter, Gilliom also withdrew from the representation. Attorney Rakestraw appeared with Mr. Briggs at the November, 1983, pre-trial hearing but did not formally appear for Mr. Briggs until shortly before trial commenced. No other

attorney ever appeared on behalf of Respondent although one, Mary Beth Ramey, obviously gave it serious consideration and a trial delay was granted from April 24, 1984 to July 12, 1984 so that she would be able to participate if it could be arranged. Respondent eventually represented herself.

61. As to the issue of delay in resolving this matter, the following appears pertinent:

(a) A grievance had been filed against Mr. Briggs resulting in the filing of a disciplinary proceeding in October, 1978; because many of the matters involved in the grievance remained the subject on on-going litigation, the Commission attorney Hughes and Mr. Stewart reached an agreement to forego further proceedings in Mr. Briggs' disciplinary matter until the guardianship and Will trials were over. They ended in December, 1980.

(b) A voluminous new set of grievances were filed against Mr. Briggs and also making allegations against Respondent based upon their actions in the guardianship and the Will contest trials; these were filed on April 9, 1981 by Attorney Marks and other participants in those trials. The grievance document was approximately 100 pages in length. Respondent was notified on May 19, 1981 that the matter was being assigned to Attorney Hughes for investigation. It elicited a response from Respondent and Mr. Briggs of approximately two volumes.

(c) The investigation was completed for re-review by the Commission and was again assigned to members Jeannie Miller and G. Daniel Kelley. Respondent, with Mr. Briggs, rquested the opportunity to appear before the full Commission before any formal action was taken upon the new

grievances so that the Commission minutes of June 11, 1982 read as follows:

> The matter of the request to appear by Richard L. Gilliom and William J. and Florence Anne Briggs in the matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughn, Samuel H. Power, Max Layden, and James Huffer v. William J. Briggs and Florence Anne Briggs was then considered. It was the consensus of the Commission that Mr. Gilliom and Mr. Mrs. Briggs be allowed to appear for 15 minutes.

Respondent was never informed of this opportunity, learning of it only during the evidence presentation in this case. The matter came up at each of the next three monthly meetings:

> July 9, 1982
>
> The matter of the request to appear by William J. and Florence Anne Briggs at the August meeting in the matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughn, Samuel H. Power, Max Layden and James Huffer v. William J. Briggs and Florence Anne Briggs was then considered. It was moved, seconded, and unanimously passed that the request to appear by William J. and Florence Anne Briggs be denied and that the matter be considered at the August meeting.

August 13, 1982

The matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughn, Samuel H. Power, Max Layden, and James Huffer v. William J. Briggs and Florence Anne Briggs was held over until the September meeting.

September 10, 1982

The first item on the agenda was the matter of R. Alan Brubaker, R. Adrian Marks, Charles R. Vaughn, Samuel H. Power, Max Layden, and James Huffer v. William J. Briggs and Florence Anne Briggs. The Executive Secretary having reported the results of the investigation and his recommendation to the Commission, and the Commission having considered such report and recommendation, and the Commission having determined there is reasonable cause to believe Respondents are guilty of misconduct which would warrant disciplinary action, it was moved, seconded, and unanimously passed that the Executive Secretary be authorized and directed to file a Verified Complaint against William J. Briggs and Florence Anne Briggs.

This was done by filing of a Verified Amended Complaint for Disciplinary Action against Mr. Briggs and a Verified Complaint for Disciplinary Action against Respondent, both filings occurring on July 19, 1983.

(d) From September 10, 1982, the date of approval of further proceedings by the Commission to July 19, 1983, the date the Amended Complaint was filed delays attributable to the Commission occurred, all directly related to the individual work load and circumstances of Commission trial attorney David Hughes. Specifically contributing to the delay in his preparation of complaints were the following: (1) major surgery for his wife in September, 1982 coupled with his prosecution of a major civil case which lead to his exhaustion and placement under doctor's care in November, 1982, (2) necessity of his filing in January, 1983 of the Disciplinary Commission appeal applying to respondent Zarko Sekerez, (3) a succession of other trials and civil matters, (4) the complex nature of this complaint in this cause.

This Officer is sympathetic to

difficulties arising from the sheer volume of the case. Other workload, however, raises a new policy consideration of the Commission upon which no direct evidence was submitted. The staffing of a disciplinary executive branch can be undertaken in at least three ways: (1) the employment of a ful-time, in house staff for all trial preparation and trial proceedings as well as presentations to the Commission, (2) the hiring of such staff on a case-by-case basis on what is essentially an independent contractor basis, or (3) some combination of these using either part-time staff or some stff members of each origin. Inherent in choices (2) or (3) is that busy trial counsel will have conflicting trial settings and that certain incidental delays caused by a busy trial schedule will occur. The Commission has opted for course of action (3) with some trial staff being full time salaried

employees and others being part-time; Hughes is part-time. This Officer cannot accept the notion that incidental delays cause constitutional infirmity. By choosing course (3) the Commission has assured that it will have available experienced trial counsel, involved in the daily practice of law and therefore more attuned to the concerns, choices, and difficulties of practice than would by any salaried full-time staff. This staffing method is certainly reasonable and, in the option of this Officer, is the best choice. The ten month delay in filing in this particular circumstance is appropriately characterized as incidental. Hughes has provided adequate explanation of his activities during this time period so as to show diligent pursuit of refiling. Particularly in view of the complexity and voluminous record of the cause, Commission reassignment to a less burdened staff

member should have been, and apparently was, a last resort.

(e) That in July, 1983 the new complaint against Mr. Briggs was filed as was the complaint against Respondent. This Hearing Officer had previously been appointed to hear Mr. Briggs' matter and had qualified on March 10, 1982. He subsequently was named Hearing Officer in this matter on September 12, 1983 and qualified on September 21, 1983. Respondent moved for a Change of Hearing Officer immediately, citing as cause that the same Officer was appointed in Mr. Briggs' case. The Disciplinary Commission by Attorney Hughes opposed change and the Supreme Court of Indiana denied a change on October 6, 1983.

(f) Pre-trial conference was scheduled for November 3, 1983, but at such conference Respondent correctly noted that notice of pre-trial had not been entered in

this cause; Attorney Hughes indicated he had believed pre-trial conference was for both cases and came prepared accordingly; Respondent indicated she was prepared for pre-trial conference in her case which was then rescheduled for and held on December 16, 1983.

At pre-trial, the joinder or bifurcation of the trials was debated; this Officer ordered the trials joined for fact-finding hearing, but directed:

> "All pre-trial proceedings however including preparation of witness and exhibit lists, pre-trial motions, and the Court's ultimate findings and conclusions herein shall be separately made, with only the actual evidence presentation to be combined."

A timetable for witness and exhibit lists was established and, upon representation that trial would take two to four weeks, trial was scheduled for April 24, 1984.

(g) Respondent had moved to allow Mr. Briggs to enter his appearance for her, a request that was eventually denied. On

March 19, 1984 Respondent moved for continuance of the trial date to allow Mary Beth Ramey to appear for her in this matter; Mr. Briggs in his cause opposed continuance; the continuance was granted and trial was rescheduled for July 12, 1984. At trial she represented herself.

(h) That on June 25, 1984, co-respondent William Briggs, having applied for and obtained the right to use the pseudonym "Anonymous", filed a complaint for injunctive relief in the United States District Court for the Northern District of Indiana Hammond Division naming as defendants in the cause the Indiana Disciplinary Commission, Sheldon Breskow, Executive Secretary, David Hughes, trial attorney for the Disciplinary Commission, and the Supreme Court of Indiana; that Mr. Briggs notified this Hearing Officer of this filing in that cause but that this Hearing Officer was not

made a party thereto; that as a result of such filing Judge Kanne of the Northern District of Indiana stayed proceedings in his Court to determine the result of the case in the State's Court to allow the State Court to make their determination of the constitutionality of the proceeding. The Respondent did not join in this filing; the filing did not delay trial here.

(i) From all appearances, preservation of evidence in this matter was far easier than it might have been in a different type of case. The relationships of the parties while various documents were created, the contents of the documents and the pleadings and evidence submitted in the Court struggles make this case one where the record of events is, by its very nature well preserved. Respondent was put on notice early that this action would result so she had ample oportunity to recall and preserve as much as necessary. Virtually

none of the issues presented in this cause are in factual dispute although some of the few disputed matters in Mr. Briggs' case were witnessed by Respondent who testified concerning them.

(j) Trial of this cause commenced July 12, 1984 and continued with occasional days for recess for all or part of 15 trial days, final argument was heard herein on August 30, 1984 and the parties waived the 30 day reporting requirement for the Hearing Officer.

62. Respondent sought to have Mr. Briggs enter his appearance for her. In view of the possibility of a conflict in the positions of the parties, the Hearing Officer did not allow the filing of such an appearance.

At trial however, the Hearing Officer allowed Respondent, William Briggs and Attorney Rakestraw to freely consult together throughout the trial of the cause

for purposes of submission of any question to witnesses or for other trial purposes. It should be noted that a great deal of the evidence presentation undertaken by Respondent had little or no impact upon her case, particularly in some of her cross-examinations; when objections to such inquiries were raised, Respondent argued that the evidence sought clearly was relevant to Mr. Briggs' case and, since she was being prosecuted as his wife, it must also effect her case. To the extent that this response makes any sense, it must be a reference to the language of paragraph 27 of the Verified Complaint for Disciplinary Action which commences, "The Respondent's conduct in this entire matter, as law partner, spouse, assistant, legal counsel to Mr. Briggs . . .constitutes a course of conduct . . . ." No discipline here is being sought because of the marital relationship; this is no more an action

against Mr. Briggs' wife than it is against his mother or his next-door neighbor. The including of the word "spouse" in the language noted was clearly to suggest that she had many of the same personal and particularly financial reasons for acting as did Mr. Briggs; it did also connote that her familiarity and intimacy with the underlying fact pattern was also more likely than would normally have been the case with a law associate.

63. Respondent has objected to his cause being joined for trial with that of Mr. Briggs. She first suggested that such a joint hearing was unheard of and was being undertaken only because she and the co-respondent are husband and wife. The response was made and supported however that other attorneys have been tried in jointly held disciplinary proceedings where the actions arose from a common underlying fact pattern. Other argument bases its

precedent upon criminal matters.

The Supreme Court obviously made a conscious choice to appoint the same hearing officer in both cases to provide the option of a joint trial. In point of fact the underlying fact pattern involving the estate planning, guardianship, and estate of Kate Smoker are common to both cases although the alleged acts of misconduct of each attorney are distinct. The determination by this Officer for joinder of these causes for evidence presentation and that preliminary matters and motions and ultimate findings and conclusions should be separately made all atttempt to recognize this difference. Further, no record of injury to the cause of the Respondent appears of record. Respondent and co-respondent indicated at two or three different stages of trial that they had held spirited discussions as to their appropriate course of action and that

they were not in agreement as to what it should be. The only specific evidence on the topic was that one of them wanted to call two witnesses, the other one didn't and that they eventually called one of them; the witnesses involved and the issue were not identified. They refrained from presenting a record in any form about those different choices or their possible significance. No showing of constitutional infirmity or of due process violation was made.

64. As part of the pre-trial proceedings in this case the Respondent filed a discovery motion which was a clear parallel to a "Brady" motion in criminal law; she asked for all evidence that the Commission might have which was favorable to her. This Officer did not accept the "quasi-criminal" argument of Respondent on this issue and, accordingly denied it to the extent that it exceeded other discovery

already undertaken. The Commission, by Attorney Hughes, provided a response anyhow, indicating that of evidence favorable to Respondent, it was all equally available to, and in fact known by, the Respondent.

65. Because of the passage of time the Respondent has objected because of the death of numerous witnesses that she was unable to receive a fair trial. As noted in earlier sections, evidence in this cause was not substantially in conflict. Only a few areas of evidentiary conflict arose. It is doubtful that the evidence of any of these witnesses could have been other cumulative.

An exception to this rule would be in fact have been the testimony Mary Bernice Smoker. However, as the central client figure in what was essentially a guardianship, Will and estate contest, it is difficult to imagine a method for doing

more to preserve her testimony than was here undertaken. It should be parenthetically noted that besides the deposition of Kate Smoker taken and admitted into evidence in this cause (taken November, 1977, in Respondent's presence); Respondent also conducted herself a lengthy deposition of Kate Smoker for the guardianship trial.

Virtually the only other witness who was referred to often during the testimony as a person who could have provided helpful testimony was the Respondent's former secretary Bertha Wolfe, now retired and residing in Arizona. Respondent indicated that she was ill but did not explain the extent of her illness that apparently led to her absence. The Respondent left the impression that her testimony would have been uniformly favorable about Respondent's character and professional capacity, but in other would have, again been cumulative.

66. The Respondent has argued throughout this matter that other attorney participants through this cause, particularly R. Adrian Marks in discussions with Mary Bernice Smoker at a time she was under guardianship and before notice of such discussions was provided to the guardian William Briggs, particularly Alan Brubaker in leaving a business card with Mary Bernice Smoker at the hospital, and particularly James Huffer or Charles Vaughn in representing clients of divergent interest, should have been investigated by the Commission.

The Executive Secretary of the Commission, Sheldon Breskow, described the circumstances by which he commences an investigation, simply stated an investigation commences with a grievance being filed and further investigation follows thereafter; only in rare occasions of blatant violation does the Commission

initiate a grievance or investigation procedure on its own.

The evidence in this cause reflects that no grievance was ever filed against any attorney participant in this action except the attorneys Briggs; it is the observation of this Hearing Officer that acts which may have been acts of misconduct were described in the evidence of this cause but that no acts were as significant and of such a serious nature as those committed by Mr. Briggs, the Respondent, and as found by this Court, except as otherwise noted herein.

67. Respondent objected to being required to testify in the belief that it violated her 5th amendment right to remain silent; before allowing the Commission to call Respondent as a witness, the Hearing Officer required that the Commission had made a case sufficient to withstand a motion to dismiss prior to the testimony of

the Respondent; a comparable determination of corpus delicti in a criminal proceedings was consciously followed in order to assure that the proceeding retained an accusatorial character and not an inquisitorial one.

Respondent also objected to the use of Mr. Briggs' testimony as a witness for the Commission in view of the long-time evidentiary rules concerning spousal testimony; Indiana's statute concerning the subject is I.C. 34-1-14-5:

> The following persons shall not be competent witnesses:
> 6. Husband and wife, as to communications made to each other.

This has never been enforced as a competency statute but is instead a privilege statute; it has impact as to communications only, not acts. Therefore, the general objection that was made to her testimony could never be applicable. If any objection were ever appropriate, it could only be upon questions relating to

marital communications.

In fact, this Officer believes all of the testimony proper and admissible on at least three separate theories. First, the Respondent and co-respondent both voluntarily testified as witnesses; while the preservation of a record of objection to testifying is not at present available to this Officer, their voluntary testimony on virtually all areas of the case must have served as a waiver. Second, a proper remedy would be to limit the consideration of the testimony given as part of the Commissioner's case-in-chief as against that individual only, not as to the other; in all candor, it is impossible to always provide the source of much of the background information, so that parts of it may have been considered on the factual settings, but none was determinative on any of the acts of misconduct. Third, but by far most significant is this Officer's

belief that any such testimony should not be barred anyhow. The activities here under consideration were the acts of professional partners, consulting together about professional matters, not about matters of marital concern. Such business matters, ostensibly being performed on behalf of a third person should not be hidden from scrutiny by this particular rule. The sole exception to all of the evidence presented which could be considered as a private marital communication would be the setting at home described by both Respondent and the co-respondent leading to the telephone conversation with Kate Smoker that is here called the "fish story". This testimony was provided voluntarily.

68. In her attempt to exercise her subpoena rights in this cause, the Respondent served with subpoenas to appear and testify, among other people, the

Disciplinary Commission members. Upon Motion to Quash these subpoenas, this Hearing Officer conditionally granted the Motion to Quash and indicated that it would not enforce such subpoenas without some showing by Respondent that the members had first hand knowledge of some fact at issue. Respondent indicated that the chief purpose of inquiry would be to inquire amongst the members why they did not seek prosecutions against the other attorney participants here. It is not difficult to further believe a purpose to have included inquiry into the considerations that went into their decision to file the complaint herein and to make particular inquiry of G. Daniel Kelley and Jeannie Miller as to the nature of their recommendation to the other Commission members. These subpoenas were not enforced.

69. Similarly the Hearing Officer did not allow the presentation of evidence of the

discussions at the Commission meetings as to what factors the members may have been relying upon in determining to proceed or to have required attorney Hughes or attorney Breskow to produce their materials or recommendations which would qualify as attorney work product.

70. Aside from these proceedings, Respondent knows none of the Commission members. There is no suggestion that the Commission or this Hearing Officer are anything other than independent.

Respondent provided testimony that since the 1981 grievances were filed however, she had one unfortunate experience involving Commission member Jeannie Miller; Respondent applied for the vacancy in the Courts of the Northern District of Indiana's federal system as a Referee; at an interview by the selection panel--presumably the Nominating Commission--Respondent believes Jeannie

Miller to have revealed that an ongoing investigation or action was in existence, thereby effectively destroying her chances of nomination.

71. That Respondent provided testimony that this period of time was the most stressful of these respondents' married life together, that because of the pressures caused by the pendency of this cause that they have come near to a dissolution of marriage, that Mr. Briggs has become more withdrawn from his friends, has withdrawn as County Chairman of the Carroll County Democratic Party at a time when Respondent had run for public office as Circuit Court Judge or as Prosecutor and narrowly losing on each occasion and was considering running again. She further indicated that the parties have had severe economic loss because of this filing including loss of business, a terrific loss of income including greatly reduced income

during the period of this trial and have had a change in their living pattern resulting in fewer vacations during this period of time. Their son, Winston who is attending law school, possibly chose an out of state school because of this proceeding. Additional testimony was provided that cases have been turned down, that there has been a loss of self confidence by the respondents, that they have had more quarrels during the period of time that this has occurred and that having this case pending has led to some restraint on their liberty in the way of limiting their freedom to travel at certain times. Evidence as to extensive costs and fees in this case was also received indicating payment by co-respondents of approximately $25,000.00 in defense fees without computing this present attorney's (Rakestraw's) fees for the trial.

72. At the pre-trial conference of

November 3, 1983 at Fulton Circuit Court, this Hearing Officer directed a meeting outside the Officer's presence for the parties to discuss possible simplifications of issues and evidence presentation, and to consider any possible resolution of the cause; this Officer believes such a meeting appropriate in the spirit of Rule 23, Sec. 14 (c), Sec. 11 (d), and Sec. 17. Attorney Hughes objected to Respondent's participation in such a meeting because of what he perceived to be her tendency to quote as fact statements out of context made by opposing counsel. Evidence of constitutional infirmity was in fact presented at trial challenging the fundamental fairness of these proceedings alleging that Attorney Hughes (a) attempted to scare these respondents with stories ow Owen Crumpacker, a disbarred attorney whose case David Hughes tried for the Commission, (b) offered to resolved these two cases

together with a (apparently unacceptable) package offer, but would not discuss them separately and (c) suggested to Respondent that she change her name. No contest for these comments is shown. Evidence from the other participants in the conference indicate that Rakestraw and Hughes did have a brief discussion about Crumpacker's present circumstances, that mention was made as to what a proper law office name would be if one of these two respondent's received disciplinary suspension for a time, and that a free-wheeling discussion on possible agreed resolutions or consent findings was held. This Officer finds no error in such conduct and, in fact, believes it to be the kind of meeting anticipated. If, for some reason, this is erroneous, there has been no showing of prejudice flowing to Respondent because of such an error.

IV

CONCLUSIONS OF LAW

UPON CONSTITUTIONAL ISSUES

Upon the issues raised as constitutional or procedural matters, this Officer now concludes as follows:

73. That the period of time required to bring this matter to hearing did not unconstitutionally burden the Respondent. Delay in completing the filing by Attorney Hughes was incidental. All further delays were the direct result of acts of the Respondent.

74. There is no indication of selective prosecution. The pro cedural method by which this Respondent was selected for prosecution and other participants were not was well explained; it is a neutral method, reasonably well suited to the efficient administration of attorney discipline.

75. Joinder of causes for trial with co-respondent William J. Briggs was not

made to appear to have caused any prejudice to the case; it does appear to have been the most efficient fact-finding method for all participants.

76. Proceedings before the Disciplinary Commission and in their prosecution of this cause are fundamentally fair in that all necessary elements to due process are provided for; specifically the Commission acts (1) as an independent Prosecutor acting without fear or favor amongst the bar that it administered, (2) that proceedings when contested are presented before an independent tribunal, (3) based upon specific allegations upon stated professional standards, (4) based upon an independent preliminary investigation in which Respondent had the right and opportunity to participate and reply being aware of the specific charges; and that in the contested proceeding, (5) the Respondent had for her benefit an

enforceable subpoena power to present her witnesses, (6) that she had the right to confrontation and cross examination of witnesses against her, (7) that she had the right to counsel of her choice, (8) that the trial was presented in due course and in as reasonably prompt fashion as the special circumstances of this cause would allow, (9) where the Commission in an accusatorial proceeding (10) had the burden of proof by a "clear and convincing" evidentiary standard and where (11) a complete right to review and appeal is available.

77. In his case, the Rules of Procedure were applied so as to afford Respondent due process.

78. Respondent's argument that in some fashion her treatment in this cause equals cruel and unusual punishment is without meaning to this Hearing Officer. While this Officer is aware of the difficulty

caused the Respondent by the pendency of these proceedings, this Officer is not aware of how this could be construed as a violation of any Eighth Amendment Right. Accordingly, no determination of violation of any Eighth Amendment Right is here made.

79. Numerous other allegations of procedural or constitutional irregularities were made. This Officer has sought to address those of colorable merit; should any other issues appear requiring further findings or conclusions, or should any major issue have been here overlooked, this Officer will, upon request, seek to address it.

V.
ULTIMATE FINDINGS AND CONCLUSIONS

Now upon these previously set out findings and conclusion, this Officer now determines:

80. Respondent, by assisting Mr. Briggs in unreasonably delaying the termination of

Mrs. Smoker's guardianship allowed her personal interests to affect the exercise of her professional judgment on behalf of her firm's client and the guardianship estate in violation of D.R. 5-101(A) of the Code of Professional Responsibility, that her actions constituted conduct prejudicial to the administration of justice in violation of D.R. 1-102 (A) (1) and (5) of the Code.

81. That by failing to communicate a settlement offer through the attorney of record and instead attempting to communicate such offer through another, the Respondent did cause another to communicate on the subject of the representation with a party she knew to be represented by a lawyer in violation of Disciplinary Rule 7-104 (A) (1) of the Code.

82. That evidence presented upon the allegations that the Will contest cause was filed in bad faith was not sufficient to

show by a clear and convincing evidence standard that she violated the Code.

83. That as this Officer understands the purposes and rationale of D.R. 5-102(A), Respondent was not in violation of the Code of Professional Responsibility by her acts of representation of Mr. Briggs in both the guardianship and Will contest cases.

84. Respondent's conduct in the entire matter, while having been determined to be in violation of the Code of Professional Responsibility as outlined above, does not rise to such a level that this Officer considers that she intentionally attempted to damage the Estate of her client and therefore the Court makes no further finding against her.

VI
RECOMMENDATIONS

In making any recommendation or in imposing sanction, the standard to be applied involves consideration of the nature of the violation, the specific acts

of the Respondent, the Supreme Court's responsibility to preserve the integrity of the Bar, and the risk, if any, to which the public is subjected by permitting the Respondent to continue in the profession or be reinstated at some future date.

Resondent's extremely bitter fight in this case and in the guardianship and Will contest cases raises serious questions about whether she has admitted to herself the professional errors she committed. It is also apparent that she proceeded without consideration of the ethical consequences in her representation of Mr. Briggs in the trials. The attitude that seemed to control all of her behavior was a backlash against the perception of unfairness that she has of the entire matter. In this she has shown a far less professional attitude than can be tolerated.

As to the violations here occuring, the improper communication was essentially a

technical violation where, being aware of the rule and attempting to skirt it, Respondent violated it. As to the other, and more serious, violation she assisted Mr. Briggs in a thoroughly reprehensible course of action with Mrs. Smoker and her property; this is not forgivable. No doubt she was motivated by feelings of love and concern for her husband who was being defamed and that she felt compelled to fight for him. Ultimately this may be considered as a mitigating factor; it cannot serve as an excuse for failure to meet the standards set out in the Code which are, after all, the minimum standards that we can tolerate within the profession. Finally, she has established a record of serving the legal profession in Carroll County well; while her writing and briefing style is unusual (a trait for which she has been punished by the Court of Appeals attorney fee award) it is clear that this

case has been an isolated incident of misconduct and that no significant risk of further misconduct exists.

Accordingly, this Officer recommends a public reprimand against Respondent.

SS/Douglas B. Morton
Douglas B. Morton,
Hearing Officer

1-18-85

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF	)	
	)	
WILLIAM J. BRIGGS	)	CAUSE NO. 1078 S 235
	)	
FLORENCE ANNE BRIGGS	)	CAUSE NO. 783 S 262

PRESENTATION OF CONSTITUTIONAL ISSUES AND ERRORS - PETITION FOR HEARING, ORAL ARGUMENT, AND ORDER OF DETERMINATION

Respondents for their Petition on Constitutional Issues and Errors allege and say:

1. These two causes of action are at present active matters pending on two separate disciplinary complaints filed against William J. Briggs and Florence Anne Briggs, hereinafter called Bill and Anne, who are husband and wife. They are residents of and are licensed to practice law in Indiana.

2. By this pleading Respondents are again calling to the attention of the

hearing officer and the Supreme Court of Indiana certain constitutional issues and fundamental errors. These issues and errors were set out in the Responses (to the Complaints) which have been on file since August 19, 1983, with the hearing officer, attorneys for the Disciplinary Commission, and the Supreme Court of Indiana.

3. Respondents request that the Supreme Court of Indiana conduct a hearing on said constitutional issues and fundamental errors. Respondents request permission to present evidence and oral argument at said hearing. Respondents further request the Supreme Court of Indiana to enter an order containing final determinations as to said constitutional issues and fundamental errors which are raised herein.

4. The Issues raised on this pleading are attached hereto and are incorporated herein as if copied in full.

They are listed on a Summary of Issues which can be used as an Index.

5. Respondents specifically petition the Supreme Court of Indiana to conduct the requested evdidentiary hearing, hold oral argument and enter the requested court order containing final determinations on said issues and errors prior to and before the trial or hearing on the merits on the disciplinary complaints by no later than thirty days after the date of the filing of this pleading. This time span is requested so as to not frustrate the right to utilize constitutional right and remedies. Pursuant to R.A.D 23, Sec. 14(a), Book 2, page 268. Burns Indiana Statutes Annotated provides that if a respondent does not answer the complaint, it shall be taken as denied. In all fairness to Respondents, they should be entitled to a reciprocal rule. Accordingly if this petition is not acted upon as requested

herein by the Supreme Court of Indiana within thirty days after it is filed, the Respondents will treat this matter as if there had been a hearing and the Petition has been denied.

6. Each Respondent, Bill and Anne, had filed a written motion for separation of trial on his or her respective complaint. The hearing officer has denied each of their motions. The Respondents now renew their motions and request the Supreme Court of Indiana to grant these motions. The court is requested to hold a hearing and permit presentation of evidence and oral argument on these motions.

7. Florence Anne Briggs filed on April 4, 1984 her Motion to Dismiss which supplemented her original Response to the Complaint filed against her. This has not been ruled upon by either the hearing officer or the Indiana Supreme Court. The court is requested to hold a hearing and

permit presentation of evidence and oral argument on this Motion.

8. Respondents say that there is an urgent necessity for granting relief, and that immediate and irreparable injury, harm, prejudice, loss, and damage will result to them if relief is not granted to them immediately. In support of this they have attached hereto their supporting Affidavit setting out facts and extraordinary circumstances which affidavit is designated as SUPPORTING AFFIDAVIT SHOWING URGENT NECESSITY FOR GRANTING RELIEF, which is incorporated herein as fully as if copied in full.

9. In order to demonstrate the harm to the Respondents which has been and will be done to them due to loss of witnesses because of the prolongation of these proceedings, Respondents have attached hereto their Supporting Affidavit setting out such facts and loss which is incorporated herein as fully as if copied

in full, which is designated as AFFIDAVIT RELATIVE TO TESTIMONY OF DECEASED OR UNAVAILABLE WITNESSES.

10. In order to substantiate certain facts for the purpose of seeking relief requested in this petition including the prayer for summary judgment, Respondents have attached hereto their Supporting Affidavit which affidavit is designated as STATEMENT OF CASE AND CHRONOLOGY OF EVENTS which is incorporated herein as fully if copied in full.

PRAYER FOR RELIEF: WHEREFORE, THE Respondents request the following items of relief from the Supreme Court of Indiana, to-wit:

(A) Respondents specifically petition the Supreme court of Indiana to conduct the requested evidentiary hearing, hold oral argument and enter the requested court order containing final determinations on said issues and errors prior to and before the trial or hearing on the merits on the

disciplinary complaints by no later than thirty (30) days after the date of the filing of this pleading, and

(B) Respondents request that all allegations of misconduct premised upon facts, circumstances and events which occurred before adoption in 1971 of the Indiana Code of Professional Responsibility be dismissed and expunged from the Complaints filed on July 19, 1983, against both Respondents because they violate ex post facto rules against retroactive operation of the Disciplinary Rules and due process law provisions.

(C) Respondents request that all of the facts, circumstances and all allegations of any misconduct which were contained in the Complaint filed on October 24, 1978, against William J. Briggs which have been incorporated into the Amended Complaint against William J. Briggs and the only Complaint filed against Florence Anne Briggs filed July 19, 1983, be dismissed

and expunged from the complaints filed on July 19, 1983 on the ground that they are stale; that the Court order declare that the materials expunged and allegations dismissed be with prejudice to the right to refile same, and the order be a bar to further prosecution of same.

(D) That the Court determine and enter an order that the Disciplinary Commission shall not be permitted to proved any allegation of misconduct by using the decision of Judge Robert Munro which was handed down in November of 1980 in the Smoker Guardianship case # G-76-14 in the Carroll Circuit Court, and that the Disciplinary Commission shall not be permitted to prove any allegation of misconduct by using the decision of the Court of Appeals of Indiana handed down on August 9, 1983, in cause #2-581A150 on the grounds that Disciplinary Commission prolonged these proceedings until they filed an Amended Complaint on July 19,

1983 against William J. Briggs and the only Complaint against Florence Anne Briggs which was only 21 days before the Court of Appeals handed down the above mentioned decision, and that such prolongation was to gain an unfair tactical advantage which is a wrongful motive--unconstitutional in violation of fundamental fairness of the Indiana and U.S. Constitutions and in violation of DR 1-102(5) engaging in conduct that is prejudicial to administration of justice.

(E) That the Court find and enter an ORDER determining that the Disciplinary Complaints be dismissed as against each of the Respondents, William J. Briggs and Florence Anne Briggs, and that the Order be a bar to any further proceedings herein, or if this relief be not granted, then

(F) That the Court treat this pleading as Complaint for Declaratory Judgment and enter judgment in favor of William J.

Briggs and Florence Anne Briggs determining their rights so that the judgment may be used as a bar to any further proceedings herein, or if this relief be not granted, then

(G) That the Court treat this pleading as a Motion for Summary Judgment and that the Court make determinations and findings and enter a judgment in favor of William J. Briggs and Florence Anne Briggs, or if this relief be not granted, then

(H) That the Hearing Officer and the Court find that the Respondents have already been required to suffer more punishment than is required and that no discipline is warranted and that no costs or expenses of any nature be assessed against Respondents.

William J. Briggs, Respondent, and Florence Anne Briggs, Respondent, each now say under the penalties for perjury that the matters and facts contained in this

Response are true to the best of his or her knowledge and belief.

ss/ Florence Anne Briggs ss/ William J. Briggs
Florence Anne Briggs William J. Briggs

(address and telephone number omitted)

ISSUES PRESENTED

ISSUE 1a: Denial of Fundamental Fairness to these Disciplinary Proceedings. The fundamental fairness of these proceedings against Bill and Anne had been destroyed by the Disciplinary Commission which has by its deliberate indifference, neglect, or by unreasonable or deliberate delay prolonged these proceedings for seven years from grievance in July of 1977 and complaint filed in October of 1978. This has caused loss of witnesses, loss of memory and ability to recall, and other harmful circumstances related to passage of time which has caused irreparable harm to Respondents in violation of due process rights of

Respondents as guaranteed by Amendments 5, and 14 of U.S. Constitution and by Indiana Constitution in Article 1, Section 12.

ISSUE 1b: Denial of Speedy Investigation and Speedy Trial. Respondents have been deprived of their right to a speedy investigation and a speedy trial by the Disciplinary Commission which has by its deliberate indifference, neglect, or by unreasonable or deliberate delay prolonged these proceedings for seven years from the grievance in July 1977 and complaint filed in October of 1978. This has caused loss of witnesses, loss of memory and ability to recall, and other harmful circumstances related to passage of time which has caused irreparable harm to Respondents in violation of Aritcle 1, Section 12 of the Indiana Constitution and Amendment 6 of the U.S. Constitution. By the case of Klophfer v. North Carolina, 386 U.S. 213, 19 L.Ed.2d 1, 87 S.Ct. 988 (1967) the U.S.

Supreme Court held that the 6th Amendment to the U.S. Constitution standards governing speedy trial are made obligations on the States by Amendment 14, the federal due process clause. The most recent case on speedy trial rights appears to be the decision of the Court of Appeals of Indiana handed down on March 28, 1984, Scott v. State, 461 N.E.2d 141. The much discussed federal case of Dickey v. State of Florida, 398 US 30, 26 L.Ed.2d 26, 90 S.Ct. 1564 (1970) set out the federal standard for review of state procedures for speedy trial and investigation. The Barker Case sets out the test. Barker v. Wingo, (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182.

ISSUE 2: Violation of Rule against Retroactive Operation of the Disciplinary Rules--Lack of Due Process Notice. The Respondents are being denied protection from the attempt to cause the Disciplinary Rules to operate retroactively. This is

so because the complaints filed against Bill and Anne contain many allegations premised upon the conduct committed many years before 1971. The Disciplinary Rules were adopted in 1971. The complaints also charge misconduct committed in 1968 and 1970 because of writing of wills in those years. The exact rhetorical paragraphs of both complaints containing these allegations are set out in the memorandum for this Issue 2. The complaints do not designate the violation of any code or any section thereof which was in effect before 1971. The Respondents are being denied due process of law because they are entitled to know in advance of the trial which code and which section thereof is being violated. The complaints are fatally defective by reason of being vague and uncertain because they do not give this due process notice. Since the Respondents are deprived of notice in advance of the trial, there is fundamental

unfairness and fundamental error. Respondents are being denied a fair opportunity to meet the accusations; they can not prepare an adequate defense and can not have a fair trial.

The Constitutional and other provisions guaranteeing these rights are: Article 1, Section 24 of the Indiana Constitution; and Article 1, Section 10, Clause 1 of the U.S. Constitution. Amendments 5 and 14 of the U.S. Constitution protect against lack of notice and in addition prohibit using or applying any law retroactively which would deny notice of the very existence of that same law. A decision of the Indiana Supreme Court is a ruling precedent; i.e. State ex rel, Benjamin v. Criminal Court of Marion County (1976) 264 Ind 191, 341 NE2d 494 which provides that "A rule changed by the Supreme Court must operate prospectively and not retroactively." The Indiana Code of Professional Responsiblity

is a code adopted by the Supreme Court of Indiana in the year of 1971 and is found in Court Rules, Book 2, page 289 et. seq., Burns Indiana Statutes Annotated.

ISSUE 3: Denial of Right of Redress to Private Citizen. Bill and Anne as citizens have the same rights as other citizens. Even though they are lawyers, they have a right not to be set apart into a separate class of second class citizens with watered down rights. Aritlce 1, Sec. 23, Constitution of Indiana; Sec. 1, Amendment 14, United States Constitution. Bill and Anne as private citizens have the same rights as other private citizens for redress of grievances under Article 1, Sec. 12, Indiana Constitution and Amendment 1, United States Constitution. Bill and Anne are being denied their right of redress of grievance possessed by others because the disciplinary complaint filed against Bill seeks in paragraph number 39 and other paragraphs to prevent

him from excercising his right of redress by charging him with misconduct for contesting the Will of Smoker. Although Anne was not a party to that lawsuit, the disciplinary complaint filed against her mistakenly charges her in paragraph 26 with like conduct and seeks to prevent her from using her right of redress. The disciplinary complaint is seeking to deny her like priviledges and immunities and, she is being subjected to the same harm as Bill. They will be harmed because the commission is seeking to deprive them of their license to practice law because they sought to utilize the same rights to redress possessed by other citizens.

ISSUE 4: Denial of Right of Redress for Grievnace -- Denial of Right to Hearing and Determination of Constitutional Issues Which are Fundamental Errors. Under Amendment 1 to the United States Constitution and Article 1, Section 12 of the Indiana Constitution,

citizens have the right to seek redress of grievances including timely redress for fundamental constitutional errors. Amendments 5 and 14 to the United States Constitution guarantee due process of law to all citizens and due process includes the right to seek redress of grievances. Bill and Anne have the right of redress for grievances for Constitutional errors and/or violations, including timely redress when it is meaningful and not a redress delayed until it is meaningless. Because Bill and Anne have raised the Constitutional issues and errors in their Responses filed heretofore on or about August 19, 1983, almost nine months ago, and because the Supreme Court of Indiana has not acted upon them, Bill and Anne have been denied their right of redress and they have probable cause for believing that they will be so denied in the future at a meaningful time, before the hearing presently set for July 12, 1984. Many of

the Constitutional errors raised in the pleading to which this is attached and raised in the Reponse filed on or about August 19, 1983, are fundamental errors which cannot be eliminated by being presented as a defense at the trial on the merits. Since the hearing officer in a Disciplinary Proceeding in Indiana has the duty of making written findings of facts as to whether there has been misconduct and of making recommendations as to punishment, the word "trial" in the sense it is used in the Constitutional law for due process purposes is the hearing before the hearing officer. If the Supreme Court of Indiana does not grant Bill and Anne their request for an evidentiary hearing, oral arguments and if the Supreme Court of Indiana fails to enter an order making a final determination on said issues and errors prior to and before requiring the hearing before the hearing officer on the merits, then the Respondents will be

denied the Right of Redress of Grievance for all of the violations of all Constitutionally protected rights which are set out in this entire pleading to which this is attached and they will be denied the right of redress of grievances at a time when it is meaningful. Respondents will be harmed if the Supreme Court does not hear evidence and oral argument and make a decision prior to the trial of this cause because requiring the Respondents to enter into a trial which would be Constitutionally void would be meaningless and because they should have time to pursue other legal remedies before trial which will be denied to them if the Supreme Court of Indiana refuses to make a timely decision on Constitutional questions raised herein prior to trial.

ISSUE 5: Arbitrary and Capricious Application of the Disciplinary Rules--Lacking Fairness and Unifority of Application--Discrimination--Denial of

Equal Protection--Vindictive Prosecution and Selective Prosecution--Bad Faith--Harassment. Bill and Anne are entitled to the same privileges and immunities under the Disciplinary Rules and to the advantages of uniformity of application of the rules and equal protection for denials of such rights--as other citizens who are similarly situated, i.e., all other persons licensed to practice law in Indiana. The Indiana Code of Professional Reponsibility, in its preliminary statement provides that "...the Disciplinary Rules should be uniformly applied to all lawyers..." see Book 2, page 291, Court Rules, Burns Indiana Statutes Annotated. Equal protection of the law is guaranteed by Article 1, Sec. 23 of the Indiana Constitution; and by Sec. 1, Amendment 14 of the United States Constitution. Bill and Anne are being denied equal protection because they are being denied privileges and immunities

under the Disciplinary Rules which are being given to prosecuting-grievants (Marks and Power) who are lawyers and to attorneys for the Disciplinary Commission. Supporting facts are set out in the memorandum for Issue 5. Although the Disciplinary Commission disciplines lawyers in Indiana for less harmful neglect under DR 6-101(a)(3), that same commission and its attorneys, neglected, unreasonably delayed, or deliberately delayed the course of these proceedings for (7) seven years by way of a complaint which has been filed since October 1978 based on a grievance filed in July 1977. Because the Disciplinary Commission has knowledge of such flagrant disparity in applications of Disciplinary Rules and of its own neglect or delay causing these long extended proceedings, the actions of the commission in violating Respondents' constitutional rights can not be excused on the grounds of oversight or honest

mistakes, but must be classified as arbitrary and capricious and made in bad faith. Their coercive actions in filing a series of charges show harassment and vindictive prosecution. Their wrongful motives demonstrate selective prosecution. Their lack of fairness and objectivity indicate failure to seek a fair and just result which violates DR 1-102 (A)(5) which is engaging in conduct which is prejudicial to the administration of justice. The actions and conduct described herein have produced unconstitutional advantages for the prosecution and have hampered and imparied the defense to the extent that they will be denied a fair trial as guaranteed by due process law under Amendment 5 and 14 of the U.S. Constitution; and Article 1, Sec. 12, Indiana Constitution. The long course of these proceedings have subjected Bill and Anne to cruel and unusual

punishment which is repugnant to Amendment 8, U.S. Constitution.

FLAGRANT EXAMPLES OF SELECTIVE PROSECUTION COMPARISON -- AVOIDANCE OF PROSECUTION -- SELECTIVE PROSECUTION

Respondent, Anne, is charged under DR 5-102(A) with serving as a trial lawyer in the Smoker will contest in which she was not a witness although her husband, Bill, was a party and a witness. She is charged with the same Disciplinary Rule with misconduct in the Smoker guardianship case. She did testify in that case but for very limited purposes. By comparision, Marks and Power, prosecuting-grievants, served as lawyers in the very same Smoker Will contest and Marks testified extensively as a major witness. He has admitted this under oath. Power was privy to most of the facts to which Marks testified and ought to have anticipated that he would be called as a witness in the will contest although he wasn't. Both served as lawyers for the

will contest and each received $60.00 per hour for acting as trial counsel in the will contest totalling approximately $31,000. In addition, Marks employed a trial secretary from his personal abstract office who received over $4000 for her services. In the Smoker guardianship case, both Marks and Powers testified as wtinesses and both served as trial counsel. They were paid $4000 by Smoker before she died and after she died they received another approximately $48,000.00 as trial lawyers in that case. The most outrageous disparity in prosecution is that the Disciplinary Commission scrupulously avoided charging either Marks or Powers with a violation under 5-102(A) but on the other hand selectively prosecuted Anne for a violation of the very same disciplinary rule 5-102(A).

Another example of serious lack of uniformity in prosecution is as follows: Bill and Anne are charged under DR 7

-104(A)(1) with communicating on a subject of representation with the Burlington Methodist Church. It is alleged that they knew the Church was represented by a lawyer. By comparison, Marks and Powers communicated directly with Smoker and began representing her, doing work for her and drafting documents for her when she was represented by another lawyer and they knew she was represented by William Briggs. At the same time, they began making decisions for her even though they knew that she was a ward and that her legal guardian was Bill. They completely disregarded the directions of EC 7-12 and immediately the began making decisions for Smoker for which they should have looked to Bill, her guardian, or for which they should have sought court approval. Their actions show defiance and disrespect for the Rules. By comparison Bill and Anne have been charged with violating DR 7-104(A)(1) and the Disciplinary Commission

has scrupulously avoided charging Marks and Powers with the same violation under the same Disciplinary Rule.

As Murray Schwartz states at page 76 of Lawyers and the Legal Profession, Cases and Materials, Bobbs-Merrill Pub., 1979, "often the enforcement of the disciplinary codes is discriminatory."

ISSUE 6: Right to Subpoena Witnesses is of no Effect if They are not Available. Under Admission and Discipline Rule 23 of the Indiana Rules of Court Section 14(b) and (d) the Respondent shall have the right to attend the hearing in person, to be represented by counsel and to produce evidence and witnesses in his own behalf as in civil proceedings. Trial Rule 45 of the Indiana Rules of Trial Procedure gives the right of subpoena power. Under Amendment 6 to the U.S. Constitution, a defendant is entitled to compulsory process to obtain witnesses. Bill and Anne cannot obtain witnesses if

they are dead, disabled or if their whereabouts are unknown. They cannot obtain meaningful testimony in their behalf if their witnesses suffer from loss of memory or other disabilities that do not permit them to competently testify. Bill and Anne will be harmed in the hearing on the Disciplinary matters because even though they have the right of subpoena and compulsory process, the right is meaningless and a mockery if they cannot subpoena dead, disabled, whereabouts unknown witnesses, or witnesses who have lost their competency to testify and/or their memories during the long extended period involving this case, and, therefore, they are harmed by being denied a fundamentally fair hearing and a meaningful opportunity to be heard.

ISSUE 7: Cruel and Unusual Punishment -- Excessive Punishment.

Prohibitions have been placed on cruel and unusual punishment by Amendment

8 to the United States Constitution and by Article 1, Section 16 of the Indiana Constitution. Cruel and unusual punishment may be established by "deliberate indifference" according to Estelle v. Gamble, (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed 2d 251. This deliberate indifference leads to the unnecessary infliction of pain and other suffering. The Respondents have been in terrorem for at the most 7 years and at the least 3 1/2 years with the loss of their licenses to practice law which produces a traumatic experience leading to mental suffering, pain, anguish, anxiety, fear, loss of confidence, confinement in activities, loss of clients through publicity, degradation by other attorneys and judges, physical ailments. This extended and protracted period of terror has not been caused by their actions but by the deliberate indifference of the governmental entity, the Disciplinary

Commission and/or their representatives. Bill and Anne are harmed in their client relationships, personal and marital relationships, family relationships, mental pain and suffering, physical ailments, loss of confidence because of the neglect of resolution of this matter and they are harmed by the unequal treatment which they have received because of these protracted proceedings and because they are being punished excessively for the charges made against them. The harm is extraordingary in this case because research has not revealed one other disciplinary case in the United States in which the proceedings have been pending but delayed for such an extended time, without a hearing and where an attorney has been subjected to such disruption of legal practice, anxiety, suffering, curtailment of normal life, pursuit of happiness for such a long extended period of time.

ISSUE 8: Disciplinary Rules should apply to all lawyers regardless of gender, without regard to marital status and without presumption that a lawyer married to another lawyer necessarily will violate a particular disciplinary rule. The Preliminary Statement to the Disciplinary Rules (Book 2, page 291, Court Rules, Burns Indiana Statutes Annotated) provides that the Disciplinary Rules should be uniformly applied to all lawyers. Equal protection of the law is guaranteed by Article 1, Sec. 23 of the Indiana Constitution and by Sec. 1, Amendment 14 of the United States Constitution. The Disciplinary Rules are not being applied uniformly to Anne, as an attorney, since the charges made against her presume that she is guilty of a violation of disciplinary rules simply because similar charges are lodged against her husband. Anne is being harmed by the charges against her based on charges against her

husband and simply because she is his spouse her license to practice law is threatened with removal.

ISSUE 9: Per se Presumption of Guilt as Violating Presumption of Innocence. Florence Anne Briggs has been considered by the Disciplinary commission to be per se guilty of violations of the Disciplinary Rules merely because she is the spouse of William Briggs, and thereby the Commission is denying to her the presumption of innocence and the right to be determined innocent until her guilt is proved beyond a reasonable doubt as provided in Indiana Code 35-41-4-1. The per se presumption of guilt denies Anne equal protection of the laws as provided by the United States Constitution Amendment 14 and by Article 1, Sec. 23 of the Indiana Constitution and it is further a violation of the preliminary statement of the Disciplinary Rules that all lawyers should be uniformly treated in the

application of the Disciplinary Rules (Book 2, page 291, Court Rules, Burns Indiana Statutes, annotated). Anne is threatened with the loss of her law license because of charges against her growing out of alleged violations by Bill of the Disciplinary Code and in this result, she is being harmed.

Use of Disciplinary Proceedings to Interfere with Right of Attorney to Represent Client and Right of Client to Choose Representation.

ISSUE 10: By its Complaint, the Disciplinary Commission has through threat of loss of license attempted to interfere with the right of Florence Anne Briggs to represent clients and through complaint filed against Willaim Briggs has sought disciplinary sanctions against him for excercising his rights as private citizen to have attorney of his choosing.

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

(FILED JAN. 28, 1987)

IN THE MATTER OF	)	
	)	
WILLIAM J. BRIGGS	)	Cause No. 1078 S 235
	)	
FLORENCE ANNE BRIGGS	)	Cause No. 783 S 262

PETITION BY NEW COUNSEL
FOR A TEMPORARY STAY OF THE COURT'S
DECISION ENTERED JANUARY 13, 1987,
SUSPENDING RESPONDENTS FROM PRACTICE

This petition for a temporary stay is filed by Abady & Jaffe, new counsel for Respondents William J. Briggs and Florence Anne Briggs.

1. Counsel was retained several days ago for the purpose of representing Respondents before the United States Supreme Court in a review of this Court's decision and disciplinary action suspending Respondents from the practice of law effective February 16, 1987. In the decision herein, this Court addressed a number of the federal constitutional issues raised by Respondents.

2. Because we believe this Court's ruling conflicts with (i) precedent in the highest courts of other states, and (ii) precedent established by the United States Supreme Court, review is sought before that Court.[1]

3. The pleadings, exhibits and record in this judicial action, as the Court well knows, are exceedingly voluminous. We simply ask that the suspension order, scheduled to take effect on February 16, 1987, and the filing requirement of Rule 23 Section 26 (b) of the Admission and Discipline Rules be stayed temporarily while review is sought in the United States Supreme Court.

4. A temporary stay of this Court's suspension order would cause no prejudice to the people of Indiana, the Bar of Indiana nor to the Disciplinary Commission which prosecuted this matter. Although the Court found Respondents to have engaged in

misconduct arising from Respondent William J. Briggs's professional relationship with one Kate Smoker, the Disciplinary Commission did not allege, and this Court certainly did not consider Respondents to be, in any sense, a danger to the community. Indeed, these proceedings arise out of the only claim of misconduct alleged against Respondents during their twenty-eight years of practice. Allowing them to practice a few more months while a writ of certiori is sought will cause no harm to anyone.

5. Moreover, charges against Respondent William J. Briggs were first filed by the Disciplinary Commission in 1978, and other charges against him and Respondent Florence Anne Briggs were filed in 1983. The matter has proceeded at a slow pace, and was not aggressively prosecuted. Hence, we respectfully submit it should be stayed but a little longer while review is sought

before the United States Supreme Court.

6. No undue delay will be occasioned by seeking such review. Time limits for seeking a writ of certiori are strictly provided, 28 U.S.C. 2101, and the United States Supreme Court will not accept a matter untimely filed.[2] Hence, should a petition for writ of certiori be unsuccessful, the stay would last but a few months, and no excessive delay will result, as is sometimes the case before busy trial courts where matters are routinely adjourned or continued.

7. Moreover, should Respondents succeed in obtaining review by the Supreme Court, the time between briefing, argument and decision is approximately one year. A stay is necessary to insure that, if the United States Supreme Court were to overturn this Court's decision, such would not be a pyrrhic victory. Mrs. Briggs was

suspended for one year, and Mr. Briggs for two. Without the temporary stay requested herein, Respondents will be needlessly punished during the year the matter is pending before the United States Supreme Court should the High Court overturn this Court's decision.

8. Respondents have been suspended from practice the same day. Hence, the family will lose its income earning ability simultaneously. Although the Court may not have considered the hardship that would result, we ask the Court to consider this as an additional reason warranting a temporary stay. While the stay is in place, and the matter submitted to the United States Supreme Court, Respondents can organize their affairs and have sufficient time to establish new means of income or employment. It is difficult for any family to lose one breadwinner. It is especially hard to lose two at the same

time.

9. Further, Rule 23, Section 26(b) of the Rules of this Court require that Respondents file affidavits within twenty days of notice of the suspension that they have placed their cases in the hands of new counsel, or advised their clients to obtain new counsel.

10. As set forth in the accompanying affidavits, Respondents have 138 active cases. It is humanly impossible to properly review these files, evaluate the steps to be taken for each one, find the appropriate counsel to refer them to, and draw memoranda or transmittal letters to new counsel within the time limits of Rule 23, Section 26(b). In fairness to Respondents' clients, we respectfully ask this Court to afford Respondents more time to wind up their affairs.[3]

11. In addition, Respondent William J.

Briggs is in the unique position of having been sole counsel to one significant client, the Bachelor Run Conservancy District, a flood control agency, for the past 26 years. Mr. Briggs advises that it would take days and perhaps weeks for him to familiarize new counsel with all the background information, legal and non-legal, to assume the task of representing this municipal organization. Hence, in fairness to this client, a public entity which affects the public interest, the Court should allow Respondents sufficient time to turn over representation to new counsel.

12. Therefore, even if the Court declines to stay the suspension during the pendency of proceedings before the United States Supreme Court, we respectfully request that the suspension be stayed for a period of no less than ninety (90) days so that Respondents may properly meet their

duty to their clients, the Bar and this Court under Rule 23, Section 26(b), and be given the time necessary to wind up a substantial practice.

Respectfully submitted,

ABADY & JAFFE
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Pro Hoc

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Respondents

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ENDNOTES

1 See, Rule 17(1)(b) and (c), Rules of the United States Supreme Court.

2 See, Rule 20(3), Rules of the United States Supreme Court, which provides: "The Clerk will refuse to receive any petition for writ of certiori which is jurisdictionally out of time."

3 At the very least, we request the Court enlarge the time requirements of Rule 23, Section 26(b) in this instance.

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF	
WILLIAM J. BRIGGS	Cause No. 1078 S 235
FLORENCE ANNE BRIGGS	Cause No. 783 S 262

ORDER DENYING PETITION FOR TEMPORARY STAY

Come now the Respondents in these causes, William J. Briggs and Florence Anne Briggs, and file a joint "Petition by New Counsel for a Temporary Stay of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice", wherein they seek a stay of this Court's order of suspension pending review by the United States Supreme Court or alternatively, a stay of such suspension for a period of not less than ninety days to afford an opportunity to wind up practice and meet their duties under Admission and Discipline Rule 23, Section 26(b). Additionally, Respondents have filed a supplementary submission in support

of this petition for a temporary stay.

This Court, being duly advised, now finds that Respondents should not be granted the relief they seek.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that Respondents' joint "Petition by New Counsel for a Temporary Stay of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice" be denied in all particulars.

DONE at Indianapolis, Indiana this 12 day of February, 1987.

(ss)Richard M. Givan

RICHARD M. GIVAN
Chief Justice of
Indiana

DeBruler, Pivarnik, Shepard, J.J., Concur.
Dickson, J., Not Participating.

IN THE SUPREME COURT (FILED FEB. 2, 1987)

OF THE

STATE OF INDIANA

IN THE MATTER OF	
WILLIAM J. BRIGGS	Cause No. 1078 S 235
FLORENCE ANNE BRIGGS	Cause No. 783 S 262

PETITION BY NEW COUNSEL
FOR A MODIFICATION OF THE COURT'S
DECISION ENTERED JANUARY 13, 1987,
SUSPENDING RESPONDENTS FROM PRACTICE

This petition for modification is filed by Abady & Jaffe, new counsel for Respondents William J. Briggs and Florence Anne Briggs.

1. We submit this petition seeking modification of this Court's decision, dated January 13, 1987, suspending William J. Briggs and Florence Anne Briggs from practice, effective February 16, 1987, for a period of two years, and one year, respectively.

2. We respectfully request that this

modify its decision to allow Respondents to serve their suspensions sequentially rather than concurrently, based on the following considerations.

3. The Respondents in these causes are in a unique position which renders this Court's punishment unusually harsh in its effect, and greatly disproportionate to Respondents' alleged misconduct.

4. It is not a common occurrence that both husband and wife are attorneys at law. It is even more unusual for the husband and wife to be the sole partners of their own firm.

5. When all the members of a firm are disciplined by suspension simultaneously the effect on the firm is devastating, as it is forced to close, perhaps permanently. The members are precluded from using those professional skills that have been the sole source of their income, and then try to support themselves by other means.

Primarily, they rely on the financial support of other family members while seeking a new way to make a livelihood.

6. In this instance, Respondents' simultaneous suspensions result in a disqualification of both wage earners in their family. This will result in a total loss of the family's earning ability.

7. Respondents' concurrent suspensions, therefore, greatly increases the effect of the penalty on each of them.

8. We submit that this very substantial hardship is unnecessary and avoidable.

9. Respondents respectfully request that the Court modify the suspension orders to provide that their suspension periods not overlap so that the penalty imposed on each Respondent will be commensurate with his or her misconduct, and not compounded by the others concurrent suspension.

10. Accordingly, we request that one Respondent be allowed to serve his or her

suspension period, before the other suspension takes effect.

11. There will be no prejudice to the people of Indiana, the Bar of Indiana nor to the Disciplinary Commission which prosecuted this matter, by granting this request. The Disciplinary Commission did not allege, and this Court certainly did not consider Respondents to be, in any sense, a danger to the community in these proceedings. Indeed, Respondent's community had indicated its support for the Respondents in several petitions filed with this Court seeking leave to have Respondents' continue to represent them during the suspension period.

12. In the alternative, we respectfully request that this Court reduce the length of Respondents' suspensions to the terms recommended by the Hearing Officer in his report; specifically a suspension of six (6) months for William J. Briggs and a

public reprimand for Florence Anne Briggs.

WHEREFORE, Respondents pray that this Court modify its decision to allow Respondents to serve their sanctions sequentially, and to reduce the sanctions to those recommended by the Hearing Officer.

Respectfully submitted,

ABADY & JAFFE
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Pro Hoc

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IN THE SUPREME COURT

OF INDIANA

IN THE MATTER OF	)	
	)	Cause No. 1078 S 235
WILLIAM J. BRIGGS	)	
	)	
FLORENCE ANNE BRIGGS	)	Cause No. 783 S 262

ORDER DENYING RESPONDENTS' PETITION FOR MODIFICATION

Come now petitioners, William J. Briggs and Florence Anne Briggs, and petition this Court for reduction of the imposed suspensions and/or that such suspensions be served sequentially. And this Court, being duly advised, now finds that such petition should be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondents' Petition for a Modification is hereby denied.

Done at Indianapolis, Indiana, this 25 day of February, 1987.

SS: Richard M. Givan

Richard M. Givan
Chief Justice of Indiana

Dickson, J., not participating.

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF

FLORENCE ANNE BRIGGS

CAUSE NO. 783-S-262

PETITION FOR REVIEW

FILED BY

FLORENCE ANNE BRIGGS

(Filed Feb. 16, 1985)

Appendix F

PETITION FOR REVIEW

Florence Anne Briggs, pro se, respectfully shows the Court as follows:

1. That she is the Respondent named above.

2. That this Petition is not being filed for vexation, irritation, or intent to overburden the Court. It is not filed with bitterness.

3. That it is being filed because Respondent genuinely believes that there are issues to present for review.

4. That the Hearing Officer dealt with this case in a patient fashion, particularly on the day of closing arguments. No statement herein is intended to be unjustified criticism of him for he was hearing a complicated fact situation, extended over many years. As Respondent stated in her Motion to Separate for trial filed in this cause:

> At Para. 25, "...past experience shows that evidence will be co-mingled and is likely to be polluted resulting in an inaccurate if not unfair decision."
>
> At Para. 27, "...practical and human limitations of the trier of fact cannot be ignored."

5. That she files this to seek redress of grievances as guaranteed by the 1st Amendment to the United States Constitution.

6. That she believes she has issues which should be reviewed and which, upon review, should result in no discipline or in no discipline in excess of a Private Reprimand.

7. That she EXCEPTS to the report of the Hearing Officer in the following particulars:

(a) That she assisted to unreasonably delay the termination of a guardianship and thereby allowed her personal interests to affect the exercise of her professional judgment. (Page 25, Para. 50). (Page 42, Para. 80).

(b) That she failed to communicate a settlement offer through the attorney of record and instead attempted to communicate such offer through another, she caused another to communicate on the subject of the representation with a party she knew to be represented by an attorney. (Page 42, Para. 81; Page 25, Para. 53).

(c) That her extremely bitter fight in this case (in defense of herself) and in the guardianship and will contest cases raises questions as to her admission of professional errors; her proceeding without consideration of ethical consequences in representation of her spouse; and her attitude of backlash against unfairness. (Page 43, Para. 2).

8. That she EXCEPTS to the Conclusions of Law on Constitutional Issues as stated on Page 40 of the Report.

9. That the Hearing Officer did not, in all instances follow the CLEAR and CONVINCING standard in making his Findings of Fact and she Excepts to the Findings where they do not meet such standard.

10. That she EXCEPTS to any finding which is co-mingled and/or polluted with that of any other person.

11. That she agrees with the finding of the Hearing Officer at Page 25 Para. 52 and at Page 42 Para. 82, and she further points out to the Court that the Attorney for the Disciplinary Commission, David Hughes, conceded these points at the time of final argument.

BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR REVIEW

12. In this brief Respondent has intended to make known to the Court some facts which support her Petition for Review. If each co-mingled or polluted issue were shown (with supporting testimony) this would be intolerably long. Where Pages and Paragraphs (Para.) are indicated, they refer to the Hearing Officer's Report.

13. Respondent has attempted to limit the review as much as possible to Exhibits and limited testimony. She does not intend to distort the record. While certain co-mingling and errors are herein pointed out to the Court, they are not all inclusive but are intended to be a sampling.

14. Respondent would hereby request the Court for an opportunity to present herself to the Court for the purpose of oral argument and/or to answer any questions the Court might have.

SPECIAL STATEMENTS WITH REFERENCE TO EXCEPTION 7(a) AND 7(c) AND MOTION TO DISMISS AND/OR IMPOSE NO DISCIPLINE

15. The Hearing Officer found against Respondent on delay and on her representation of guardian, spouse, client, associate in other trials.

16. With reference to the above, Respondent says:

(A) No grievance was filed against her charging her with delay or representation as above stated.

(B) No notice was given to her of the charges of delay or representation until the Verified Complaint was filed.

(C) At Page 35 of the Hearing Officer's Report he states:

> "The Executive Secretary of the Commission, Sheldon Breskow, described the circumstances by which he commences an investigation; simply stated an investigation commences with a grievance being filed and further investigation follows thereafter...."

(D) Indiana RAD 23, Sec. 10 states that upon the filing of a grievance, the Executive Secretary shall send a copy to the Respondent and request a written response within twenty (20) days. Further if the Executive Secretary considers any charges not contained in the grievance, he shall notify the attorney of the additional charges and the attorney shall have twenty (20) days to make a response.

It is only after the notice has been given by the Executive Secretary and the attorney has had an opportunity to reply that the alleged misconduct may be the subject to a count of a complaint filed against the attorney.

THIS MANDATE WAS NOT FOLLOWED AND THEREBY PROCEDURAL DUE PROCESS WAS VIOLATED.

(E) Paragraphs 25 and 27 of the Verified Complaint against her charges her with assisting in the delay in the termination of the guardianship for personal reasons and Paragraph 23 charged her with representation of a law associate.

(F) The Answer of the Respondent timely filed pointed out the procedural due process violations and requested dismissal of charges where the mandates of RAD 23, Sec. 10 were not followed. Such dismissal would follow In Re Ruffalo, (1968), 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117.

(G) The first notice Respondent had of the "delay" charge and the representation was with the filing of the Verified Complaint received by her on July 20, 1983. Since this was the first notice it violates the provisions of Indiana RAD 23, Sec. 10. The Disciplinary Commission has arbitrarily violated its own rules and this is impermissible. See Clarkson v. Dept. of Insurance, (1981), Ind.App., 425 N.E.2d 203.

(H) The whole procedure with reference to delay and representation violates:

(1) Amendment 5 to the U. S. Constitution whereby no person shall be deprived of life, liberty or property without due process of law; and

(2) Amendment 14 to the U. S. Constitution which provides that no state shall deprive any person of life, liberty or property without due process of law.

(I) The right to practise law is a property right and therefore falls under the protection of these Amendments. See Erdman v. Stevens, (1972), 458 Fed.Rep.2d 1210.

(J) The requirements of procedural due process must be met before bar discipline can be imposed. Willner v. Committee on Character and Fitness, (1963) 83 S.Ct. 1175, 1179 and In Re Ruffalo, supra.

(K) Presumably the requirements of RAD 23, Sec. 10 are met when other attorneys are involved in similar proceedings. Failure to follow the rules with respect to this Respondent results in a violation of Amendment 14 to the U. S. Constitution which provides that all persons shall be entitled to equal protection of the laws.

WHEREFORE as part of this Brief the undersigned MOVES

the Court to DISMISS the charges and/or to impose no discipline based on delay or representation as above stated.

BRIEF FOR EXCEPTION 7(a)

17. The delay charged in the Complaint and found by the Hearing Officer related to a period of time basically from the filing of the Petition for Removal to the ultimate return of control of her property. (Page 11, Para. 26). This encompassed a period from February 14, 1977 (Petition to Remove Filed, Page 8, Para. 18) to May 26, 1977, (termination of guardianship, Page 13, Para. 28).

18. In July 1977, Marks, Power and Smoker filed a grievance against Respondent. No allegation of delay was made.

19. In July 1978, the grievance against Respondent was found to be without merit.

20. In November 1977, the Disciplinary Commission took Smoker's deposition which is part of the evidence in this case. This is the only testimony of Smoker in the cause.

21. Since no delay charge had been made against Respondent, no questions were asked of deponent with reference to same.

22. At Page 11, Para. 26 the Hearing Officer states that during the crucial time individuals stopped by Smoker's home and found her in various stages of emotional display. No questions were asked of Smoker by the Disciplinary Commission with reference to these alleged incidents. Since Respondent had not been a participant in them and had no knowledge of them, she could not have known in November 1977 to have asked any question about them. One cannot question about things that one does not know have happened. These

incidents surfaced after Smoker's death in 1979 and were presented to the Hearing Officer by hearsay, over objection of Respondent.

23. Under the U. S. Constitution Amendment 6 an accused person has the right to be informed of the nature and cause of the accusation and to confront and cross-examine witnesses against him but this confrontation and cross-examination must be after a charge has been made. When no charge has been made, there is no adequate confrontation. The purpose of cross-examination is to arrive at the truth of the matter and to examine persons for bias and prejudice. Lagenour v. State, (1978), 268 Ind. 441, 376 N.E.2d 475.

24. The Hearing Officer's Report at Page 12 states that the emotional events were not related to Respondent but that, "...it must be noted that Respondent counseled him to pursue this wrongful course of action and assisted him in its perpetration." ("him" refers to guardian) Respondent did not know about all of the emotional events at the time Smoker was living and could be, herself, examined about them.

25. This finding either:

(A) Punishes Respondent for exercising legal judgment in this case or

(B) Punishes Respondent for being the spouse of a guardian.

26. An attorney is not liable for an error or mistake in judgment so long as he acts in the honest belief that his advice is well-founded and in the best interests of his client. Glenna v. Sullivan, (1976), Minn. 245 N.W.2d 869.

27. In an incompetent counsel case in a criminal proceeding the Indiana Courts have held that an overview must be taken of the total circumstances, different attorneys can make different judgment

decisions, there must be adequate representation and there is a presumption that the attorney has performed his duty. Smith v. State, (1979), 396 N.E.2d 898, and other following cases.

28. Respondent testified that she does not believe her advice to another client would have been different than that given to her spouse. Permission is requested to supply this record at a later time.

29. Under Wong v. Tabor, (1981), Ind.App., 422 N.E.2d 1279, as this Respondent understands it there are standards announced for an attorney's participation in litigation:

(A) Does the attorney subjectively believe the claim merits litigation on the basis of facts known to her at the time?

(B) Would no other competent and reasonable attorney familiar with the law of the forum consider the claim worthy of litigation on the basis of facts known at the time.

30. The only person who can answer 29(A) above is Respondent and her answer is "yes".

31. Some facts known to her at the time were:

(A) That the guardian had orally and in writing offered ward his resignation. (See Page 6, Para. 13; Exhibit A-40, Resignation letter; Exhibits B-27 and B-28, Unger tape, last 3 pages).

(B) That the letter to ward at Exhibit A-40 guardian stated that when a doctor would confirm her competency he would ask the Court to end the conservatorship

(C) He wanted to rent her land any way she wanted to do it and was not threatening to plow it up contra to her wishes. (See Exhibit B-26, Cash Rent Lease, Para. 2 under "Terms and Conditions" not effective until Court approval; Exhibit A-8 Letter to tenant; Exhibit B-27 and B-28, Unger tape, Exhibit B-30 and A-18 regarding directions ward gave guardian on February 11, 1977).

(D) That guardian had filed timely his Inventory with the Court and provided an increased bond as Ordered. (Exhibit Petitioner's 17). (The Petition alleged that guardian had not revealed the amount of the ward's assets to the Court).

(E) That many of the allegations in the Petition to Remove signed, not by the ward, herself, but by Marks and Power were false. (Petitioner's Exhibit 27).

Although the Indiana Courts hold that statements in pleadings are absolutely privileged if relevant and pertinent, this Respondent believes the better rule to be that "...there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., (1974), 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 1891.

32. Respondent submits that she was attorney of record for a party to a lawsuit unnecessarily instituted for the purpose of maliciously injuring and harassing her client, the guardian. The lack of necessity for the filing of this lawsuit was recognized by the Judge trying same. See Exhibit A-52 which states:

"...prior to the filing of the ward's petition to remove the conservator, the conservator had offered to resign and permit a successor conservator to be appointed, and that the ward had refused this offer. Assuming this allegation to be true, then the petition to remove the conservator was completely unnecessary...."

33. Respondent in advising her client as to procedures in the guardianship had knowledge imparted to her by Dr. Wagoner, Smoker's physician, that from February 1977 through May 1977 Smoker could be unduly influenced. Dr. Wagoner later testified to this as has been stated in the Hearing Officer's Report. (Page 18, Number 4 of Para. 35, mid-page.)

34. The case of Wurm v. Haessly, (1977), Ind.App., 360 N.E. 2d 12, was handed down by the Indiana Court of Appeals on February 14, 1977, and the holding of that case was that it is inappropriate to terminate a guardianship if the ward is subject to "undue and inappropriate pressures." She relied on the Wurm case.

35. The initial pleading filed by Marks and Power on February 14, 1977, commenced litigation by taking the fact (known to them) of Smoker's restoration to competency (which fact was unknown to

the guardian) and turning it into an adversary proceeding.

> In July of 1983 Chief Justice Warren Burger, speaking to London's Middle Temple Hall said, "...lawyers should be the healers of conflicts" but too many "act more like warriers eager to do battle than healers seeking peace."

36. State v. Turner, (1975), 217 Kan. 574, 538 P.2d 966 holds that, "Indeed, inflammatory remarks have no legitimate place in judicial proceedings."

37. The undersigned agrees with the statement at Page 12, last Paragraph:

> "The termination of a conservatorship where three physicians unanimously agree that a ward is restored to competence, normally would be a simple and routine matter."

However, Marks and Power did not treat it as a simple and routine matter. They treated it as an adversarial matter. Rather than filing a simple and routine pleading, they were eager to do battle and so filed a pleading filled with inflammatory remarks and falsehoods which had no place in the proceeding to restore a ward to competency, yet they verbally abused the guardian by making untrue statements and impugning the honesty and integrity of the guardian.

38. So far as the second prong of Wong v. Tabor (see 29(B) above) the Disciplinary Commission attorney presented no evidence that no other competent and reasonable attorney would consider the claim worthy of litigation.

39. Respondent states that at the time these decisions were made, she discussed them with Ralph Hanna, an attorney of Delphi, Indiana, who had been an attorney for Smoker prior to his retirement. Smoker continued to consult him during the period of time the decisions were made. Ralph Hanna died in March of 1981. The

conduct which the Hearing Officer found against was from February 14, 1977, to late May 1977. No grievance was ever filed against Respondent for this conduct. The first notice Respondent had that she would be charged with this misconduct was on July 20, 1983, on the receipt of the complaint against her. Ralph Hanna was dead on July 20, 1983.

At the hearing, Respondent testified that she had been in consultation with Ralph Hanna about the proper way to handle the unnecessary and defamatory pleading filed by grievants which commenced eight years of litigation and that he was the one who advised she seek "strict proof." Permission is requested for an enlargement of time to have this transcribed.

40. At the trial what all persons involved termed "offers to prove" were made. One was made with respect to Ralph Hanna.

41. Ralph Hanna was not a cumulative witness but a very substantive and essential witness on behalf of the Respondent to show that she consulted with him about the proper course to take.

42. Had the delay charge been timely made (July 1977) then not only could Smoker have been questioned about it prior to her death in November 1979, but also Ralph Hanna could have been questioned prior to his death in March 1981.

43. Therefore, there has been actual prejudice to Respondent because of the delay in this charge. Actual prejudice mandates dismissal of the charges.

> See: Dickey v. State of Florida, (1970), 398 U.S. 30, 26 L.Ed.2d 26, 90 S.Ct. 1564; Barker v. Wingo, (1972), 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182; U.S. v. Marion, (1971), 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (where there was a 3 year delay between the occurrence of the crime and the indictment).

44. If the Respondent advised her client incorrectly or made wrong judgments, she regrets same. However, they were judgment

decisions made at the time, and some reasons therefore have faded in memory with the passage of eight years. At that time Respondent objectively believed that the decisions were legally correct. They were made after consultation with a well-known and well-respected senior member of the bar, Ralph Hanna.

45. No punishment should be meted out to Respondent for legal judgment decisions made many years ago, for which no grievance was ever filed and for which she was unable to present a crucial witness, and which is believed to meet with the standards enunciated in the Wong case, supra.

****

46. Under Amendment 6 to the U. S. Constitution each person is entitled to a speedy trial. This Amendment has been violated in this case because no notice of a violation was filed against Respondent until July of 1983 for conduct alleged to have happened in the first six months of 1977. These are stale charges and stale charges are not favored under the law. In Re Elliott, (1906), 84 P. 750.

47. The finding of punishment for delay may constitute punishment for being the spouse of a guardian (that guardian being also an attorney but from February 14, 1977, through May 26, 1977, acting only in the guardian capacity and not in the attorney capacity.)

Although there is a caveat that a lawyer-spouse must be careful to observe the requirements of the DR's, ABA Formal Opinion 340, 61 ABAJ 1542 (1975) states: "We cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule." Surely it should not be the intent of the Disciplinary Rules to interfere with attorneys' rights to privacy or to imply that one's spouse should be selected on the basis of occupation-that is, that one lawyer should not marry another lawyer.

48. To the best of the recollection of the undersigned there was no testimony that Respondent allowed her personal interests to affect the exercise of her professional judgment and no testimony was presented by the Disciplinary Commission to show another attorney would have given other counsel. Respondent's position was that her client had been defamed (the Hearing Officer admits the defamation at Page 43 of his Report). There was no proof that if she had represented another client (not a relative or close, personal friend) that her advice would have been any different. Therefore, the Hearing Officer's findings had to be based on presumptions which were impermissible under ABA Opinion 340 or based on the fact of the marital relationship.

49. Basing a finding on marital relationship is violation of Amendment 14 to the U. S. Constitution guaranteeing equal protection of the laws and Amendment 9 guaranteeing other rights.

50. Finding against Respondent because of her marital relationship violates the right of free speech guaranteed by the 1st Amendment to the U. S. Constitution. Under this Amendment, Respondent had a right to represent a client (whether relative or non-relative); she had a right to speak in his defense; she had a right to use judgment in making decisions; she has a right to pursue her profession without being punished for marital status.

BRIEF FOR EXCEPTION 7(C)

51. At Page 43 of his Report the Hearing Officer states that:

> "Respondent's extremely bitter fight in this case and in the guardianship and will contest cases raises serious questions about whether she has admitted to herself the professional errors she has committed."

52. Respondent did not intend to show bitterness to the Hearing Officer but only intended to defend herself to the best of her ability and to get the facts to the Hearing Officer as she would to any other trier of facts. In so far as Respondent did show what the Hearing Officer perceived as bitterness, she apologizes to all persons concerned.

53. She regrets that the Hearing Officer perceived her defense of herself as improper for she believes that under the 1st Amendment to the U. S. Constitution the right to defend herself is included in free speech, and any attempt to punish her for her defense of self would be a curtailment of free speech.

54. Honorable Robert Justice, Judge of the Cass Circuit Court, testified that Respondent is usually a fairly agressive trial attorney. See certified copy of that testimony.

55. Respondent submits that she knows of no other way to try a case except to put her heart and soul into it and to give her best efforts to the case. This she has perceived as her duty whether she represents herself or another client.

This "heart and soul" approach has brought her praise from clients and Judges as well as from opponents. One such Judge was the former Hearing Officer, Honorable Harold Staffeldt, now deceased. Respondent had tried several cases in front of Judge Staffeldt (resulting in one reversal) and he had told her she was the best prepared criminal defense lawyer he had seen. Therefore, Respondent has suffered a real prejudice to her case with the death of Staffeldt who would have been familiar with her trial style and her belief in justice.

56. Respondent believes that this "heart and soul" approach has resulted in her trial success over 26 years of practise.

During her career as a criminal defense attorney, Respondent has lost only two defense jury trials. One of those was partially

reversed by the Court of Appeals and never retried. The other case the Prosecutor confessed error and a lesser offense was pled to by the defendant. Transcript of this testimony has not been provided in the belief that Respondent's signature below is sufficient to verify these statements.

Presently, she is defending an attempted murder case on a pro bono basis because under the facts of the case she perceives this as her duty. Trial of this cause is scheduled for February 19, 1985.

57. Right to defend one's self is preserved in the 1st Amendment to the U. S. Constitution whereby a person is granted the right to seek redress of grievances and whereby a person is guaranteed freedom of speech. Respondent defended herself as a private citizen.

58. If the finding against Respondent for presenting her own defense if permitted to stand will chill the rights of other persons who might wish to defend themselves. At Pages 20 and 21 the Hearing Officer recognizes that persons are free to represent themselves.

59. This being so, then when can this freedom be restricted? Generally, the government may restrict it in two broad categories, i.e. because of its content (such as advocacy of illegal conduct) or because of some, evil unconnected with the speech's content. Defense of one's self in this case by Respondent did not fall into either category and discipline for same should not be permitted. The mere threat to other attorneys of discipline for defense of self has a censorial and chilling effect.

60. In this case the Hearing Officer found at Page 21, Para. 41:

> "...in the guardianship trial before Judge Munro, no misleading or improper conduct appears to this Officer by virtue of the Respondent's trying this cause...with somewhat less assurance, the same can be said of the will contest tried to a jury."

Further at Page 25, Para. 54:

> "That as this Officer understands the purposes and rationale of DR 5-102(A), Respondent did not violate the Code by her participation as counsel on behalf of Mr. Briggs."

Yet in a seeming contradiction of the above findings the Hearing Officer says at Page 43 that:

> "...she proceeded without consideration of the ethical consequences in her representation of Mr. Briggs at the trials."

61. Further at Page 43 the Hearing Officer indicates that there was an extremely bitter fight in the guardianship and will contest cases. To the best of Respondent's recollection the only testimony on this matter was given by Judge Justice who did not find her trial actions in the will contest different than in other trials. There is no clear and convincing evidence of Respondent's bitterness in either the guardianship or will contest cases. Respondent hopes that her presentation of issues here will not be interpreted as bitterness since it is not that but an attempt to seek redress of grievances.

62. While the Hearing Officer finds no improper conduct in her participation in the trials for the guardian and will contestant, he does impliedly find misconduct in stating that she proceeded without consideration of ethical consequences.

63. This then leads to one area of selective prosecution as alleged by Respondent in her Answer to the Verified Complaint filed August 17, 1983, in her Presentation of Constitutional Issues filed May 7, 1985, and in the hearing in July-August 1984.

64. The seed for selective prosecution is Amendment 14 to the U. S. Constitution whereby a state shall not deny to any person within its jurisdiction the equal protection of the laws.

65. The Preliminary Statement to the Code of Professional Responsibility states that:

> "...the Disciplinary Rules should be uniformly applied to all lawyers...."

66. The Hearing Officer recognizes that the Disciplinary Commission should act "...without fear or favor amongst the bar...." (Page 40, Para. 76).

67. Selective prosecution is defined as follows:

> "If others similarly situated have nog generally been prosecuted and you have been singled out for prosecution and the state's discriminatory selection of you for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as...the desire to prevent his exercise of constitutional rights, then selective prosecution has been established. U. S. v. Berrios, 501 F.2d 1207 (2d Cir. 1974).

68. Beto v. Stacks, (1969) 408 F.2d 313 (5th Cir.) has held:

> "Prosecutorial bad faith can give constitutional dimension to trial but prosecutorial good faith cannot shrink constitutional right to no right."

69. At Page 19, Para. 37 the Hearing Officer recognizes that at the guardianship trial, Attorneys Marks and Power trying the case for the ward (or Temporary Administrator) were called as witnesses and testified extensively (See Exhibit A-33). At Page 20, Para. 40 the Court recognized that Attorney Marks was the attorney for the Temporary Administrator, described his participation as "of counsel" and "...he was also a key witness of course."

70. During the testimony of Respondent she testified that she objected to Marks and Power's participation as counsel/(not "of counsel") in the will contest but because of strenuous arguments of Marks and Power that they were counsel and had the right to be present, Respondent's objection was overruled. Permission is requested to obtain a transcript of this testimony.

and witness

71. The charging of Respondent and the non-charging of grievants for the same offense has presented two classes of attorneys both of whom were advocates and witnesses and/or attorneys.

(A) Attorney-Grievants who are not charged,

(B) Attorney-Respondent who is charged.

UNCHARGED MISCONDUCT OF GRIEVANTS

At Page 35, last Paragraph, the Hearing Officer states:

> "The evidence in this cause reflects that no grievance was ever filed against any attorney participant in this action except the attorneys Briggs; it is the observation of this Hearing Officer that acts which may have been acts of misconduct were described in the evidence of this cause...."

This finding omits the fact that Respondent was advised not to file a grievance until her case was over. Permission is requested to have this testimony transcribed.

Certainly all of the evidence on acts of uncharged misconduct of attorney grievants was not presented to the Hearing Officer. The acts are detailed out in the Presentation of Constitutional Issues filed on or about May 7, 1984, and incorporated herein.

Because the Disciplinary Commission filed a Complaint against the Respondent for which no grievance was presented, then surely the testimony of the Executive Secretary that no action is taken on a charge until a grievance is filed must fail.

SPECIAL STATEMENT ON DISTINCTIVE VALUE

72. One exception of DR 5-101(B-4) is when the refusal would work a "substantial" hardship on the client because of the "distinctive value" of the lawyer. This is also an exception by reference of DR 5-102(A).

73. The words "substantial" and "distinctive" are vague, set out no ascertainable standards and are entirely subjective.

74. Some contradiction exists in the Hearing Officer's Report with reference to these DR's: At Page 20, Para. 41, he declines to find that Respondent falls within the distinctive value exception. However, at Page 33, Para. 62, he states as follows:

> "The including of the word 'spouse'...did also connote that her familiarity and intimacy with the underlying fact pattern was also more likely than would normally have been the case with a law associate."

75. Standards by case are set out in Lyle v. Superior Court of San Bernardino County, 122 Cal.App.3d 470, 175 Cal.Rptr. 918 (1981, 4th Dist.). The Court vacated an order disqualifying plaintiff's lawyers from representing client because two attorneys from the same firm would testify where:

> (A) Plaintiff would suffer financial hardship if required to hire new counsel since the law firm was not charging the client because she was an employee of the firm, and
>
> (B) She had developed the utmost trust and confidence in law firm's abilities to represent her, and
>
> (C) The Court failed to point to any real detriment to the opponents or to the judicial process.

76. Testimony was given at the trial of Respondent's distinctive value by the litigant. He subjectively believed that she fell

within the Number 4 exception. Her distinctive value in this case and related proceedings was that no other attorney could so well understand the facts as could Respondent even allowing for memory lapses over eight years. Permission is requested to obtain a transcript of the testimony of the client.

77. Even at the Disciplinary Hearing reliance was placed by Co-Respondent's Attorney and even Attorney Hughes for details and dates on Respondent. This clearly indicates distinctive value.

78. The Hearing Officer has recognized the detailed fact situation in this case:

> "Particularly in view of the complexity and voluminous record in this cause, commission reassignment to a less burdened staff member should have been and apparently was, a last resort." (Page 31, Para. 61d)

79. Attorney for the Disciplinary Commission, Hughes, spoke about the "...complex nature of this Complaint in this cause." (Page 30, Number 4, first paragraph on page).

80. The Disciplinary Commission Attorney, Hughes, was notified by way of the filing of the list of witnesses in this cause that he would be a witness yet because of the complexity of the case, he had distinctive value to the presentation of the Commission's case.

81. The standard for permitting to Hughes to act as both attorney and witness must be the same standard applied to this Respondent, or the uniformity mandated by the Preliminary Statement to the Code would be violated.

82. The Court is requested to find that Respondent fell within Exception Number 4...otherwise there would be selective and arbitrary enforcement of the Rules-as applied to Respondent and to the Attorney for the Disciplinary Commission.

(A) Respondent met the Lyle, supra, criteria in her representation of the civil litigant. To find otherwise would be to find a split in the circuits.

SPECIAL STATEMENT WITH REFERENCE TO EXCEPTION 7(A)

83. In 1977, Respondent exercised her right as an attorney to represent spouse in civil litigation and also at the Disciplinary Commission and no charge was filed against her for these acts.

84. In 1980, Respondent exercised her right as an attorney with trial experience, to represent spouse in civil litigation.

85. It was three years after the 1980 representation that Respondent was notified, first by way of the Verified Complaint filed against her, that the Disciplinary Commission was charging her with a violation for representing him.

86. Respondent is an attorney who "...has established a record of serving the legal profession in Carroll County well." (Page 43). No other grievances have been filed against her except in Smoker matters. She commenced practise in 1958. (Page 2, Para. 1).

87. Had the Disciplinary Commission considered this a violation they had a duty to advise her of such in 1978 (at the time they dismissed the first Smoker grievance against her).

88. The charges against Respondent must be put in context with the fact that a Verified Complaint against spouse had lain dormant since October 1978 and in the context that she was repeatedly referred to as "spouse".

89. There is an appearance that a charge was filed against Respondent because she exercised Constitutional rights.

90. It is well settled that to punish a person for exercising a constitutional right is "a due process violation of the most basic sort." Bordenkircher v. Hayes, (1978), 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 as cited in Walker v. State, (1983), 454 N.E.2d 425 (Ind.App. 1 Dist. 1983)

91. The bringing of a greater charge against her because she exercised her right as an attorney in 1980 is a per se violation of due process and discriminates against Respondent as an individual attorney.

> Blackledge v. Perry, (1974), 94 S.Ct. 2098 established that prosecutorial substitution of a greater charge after the accused has exercised a statutory or procedural right constitutes a per se violation of due process.

92. Respondent continues to believe that the Verified Complaint was filed against her because she is the spouse of an attorney charged with misconduct. There is an appearance that it was filed for coercion.

93. The Complaint filed against Respondent states:

> She "appeared and served as counsel for the conservator, her husband and law partner...." It further states that she appeared and served as counsel for the objector, her husband and law partner...." The complaint further says that her conduct as law partner, spouse...." (underlining ours)
>
> The basis for the Complaint against Respondent appears is related only to conduct of her spouse as it states that Respondent's "husband and law partner...was retained...."

94. The 14th Amendment to the U. S. Constitution guarantees all persons the equal protection of the laws.

95. Women attorneys are presently minorities and women attorneys who are spouses of attorneys are minorities.

96. The Report of the Hearing Officer, excluding the Constitutional issues, consists of 54 Paragraphs. Of these Paragraphs, Number 1 is an introductory, several Paragraphs such as 12, 23, 27, 33 and 39 do not refer to either of the Briggses. Except for Para. Number 1 it is not until Para. 42 that Respondent is referred to individually, as an entity separate from her spouse. Even the Recommendations at Page 43 refer to "love and concern for her husband who was being defamed."

97. There is no recognition whatsoever by the Hearing Officer just as there was no recognition by the Disciplinary Commission that she was an independent attorney with judgments made by her with reference to what she thought at the time was in the best interests of her client. Had her client been a non-relative, she would not be charged. There is an appearance that these cases were joined because of spousal relationship.

BRIEF FOR EXCEPTION 7(B)

98. In the findings at Page 42, Para. 81, the Hearing Officer says that Respondent failed to communicate an Offer of Settlement to the attorney of record.

> (A) Respondent respectfully differs with this statement and in support thereof cites Exhibit A-37 (Appearance of Vaughan) and Exhibits Petitioner 14, 15 and 16 (Letters to Huffer, Justice and Vaughan) all of which were admitted into evidence.
>
> (B) Respondent further submits that portion of the testimony of grievant, Huffer, wherein he admits that Respondent did communicate the offer and requested that he communicate it to his clients.
>
> (C) She further submit that portion of testimony of Karstadt and Barber wherein it was stated that the offer of settlement was not so communicated, as requested.
>
> (D) Respondent requests permission to obtain that portion of testimony of Huffer or Respondent advising Respondent to have all future negotiations with Vaughan.

99. She does not believe she failed to communicate an offer of settlement to the attorney of record.

100. The fears of Respondent that the offer was not being communicated had a basis in fact. A prior letter from Huffer to his then clients disparaged Respondent and indicated there was no settlement possible. (Exhibits A-5 and A-38).

101. The motive of attorneys in non-communication or improper communication of offers of settlement in order to get more fees has been recognized. Re Purdy, (1933), 166 Okla. 31, 25 P.2d 1096, 92 A.L.R.3d 288, 301.

102. As part of his representation of Respondent, Attorney James Stewart (deceased June 1983) personally traveled to Burlington, Indiana, and interviewed Rev. Arthur Schenck outside the presence of Respondent. In Stewart's Answer to the grievance regarding Schenck, he acknowledges his interview of Schenck and that Schenck told him that he was only asked to determine if the offer had been communicated.

103. So far as the testimony with reference to Schenck is concerned, James Stewart is dead. He had interviewed Schenck in October 1981 and knew what Schenck had told him. In June 1982, Mr. and Mrs. Briggs and their attorney were given permission to appear at the Commission. No notice of this permission was given Respondent. (See Page 29, Para. (C).). The Mr. Gilliom referred to was Mr. Stewart's law partner but Mr. Stewart was the attorney for Respondent at this time. Mr. Stewart was still practising law in June of 1982.

104. Had the Respondent been notified of permission to appear, Mr. Stewart could have appeared at the Commission itself and explained in detail what Schenck had told him-which was at variance with Schenck's later testimony. Then perhaps this charge would not have been part of the Verified Complaint.

105. Although the September 10, 1982, Commission authorized the filing of the Verified Complaint, it was not filed until July 19, 1983, by which time Stewart had been dead a month.

106. Had the Verified Complaint been filed timely, Respondent would have acted immediately to take Stewart's deposition. His testimony would have been crucial to rebut Schenck.

107. For this reason alone the Respondent does not believe that the delay of the attorney for the Commission was "incidental."

108. Had Stewart testified, either in person, or by deposition, the findings of the Hearing Officer might have been different. Because of the delay of the attorney for the Commission in filing the Verified Complaint, Stewart's testimony is lost and actual prejudice has occurred to Respondent.

(A) In testimony Respondent testified that James Stewart had informed her by way of a letter that Hughes told him we had "won" the Schenck matter and he "could not get" the Commission to file a Complaint on this matter. Permission is requested to get this testimony transcribed and filed at a later time.

(B) Stewart died-June 1983. The Complaint was filed July 1983. Therefore, Respondent lost her Schenck witness by the neglect of the Disciplinary Commission to advise her she could appear at the Commission meeting (Page 29) and by the delay in the filing of the Complaint until after the death of Stewart.

SPECIAL STATEMENT ON CO-MINGLING

109. Respondent Moved for Separation of her trial from that of her Spouse. (See Petition to Separate filed in this case)

110. Respondent did believe that her hearing should not have been combined with that of another Respondent because many of the issues were different, the time frame for trial was differenct and the joint hearing led to the making of choices that should not have been necessary had separate hearings been held. The Hearing Officer recognized some of these problems, see Page 34, Para. 63 where he states:

> "Respondent and Co-Respondent indicated at two or three different stages of trial that they had held spirited discussions as to their appropriate action and that they were not in agreement as to what it should be."

111. An example of co-mingling is a reference to a suit filed in the Federal District Court for the Northern District of Indiana at Hammond, to which suit Respondent was not a party. See Page 32, Para. 61(i). There was no basis for including the reference to "Anonymous" in Respondent's findings.

112. The holding of joint trials chilled the presentation by Respondent of differences she had with the other Respondent. Part of the "spirited discussion" referred to (which was a soft terminology for a very bad quarrel) involved the manner of cross-examination by other Respondent's attorney of certain witnesses. The old axiom is not to ask a question unless you know the answer. Well, the other Respondent's attorney (whom I admire personally) did just that about facts with which he was not familiar. This was detrimental to this Respondent as shown by the Hearing Officer's findings.

113. Certainly the Hearing Officer tried to separate issues and facts in these cases. The fact that he did "pollute" the evidence or

had problems with separate charges and statements and the consequences is not to be interpreted as criticism of him-but as a danger inherent in the whole joint trial decision and situation with two different sets of charges and individuals. The Hearing Officer states at Page 36, last paragraph:

> "...in all candor, it is impossible to always provide the source of much of the background information...."

114. In the Motion to Separate (Paragraphs 29 and 30) for Trial this Respondent discusses the marital conflict and the strain on the relationship and the use of procedural impediments causing such strain. The Hearing Officer found that this very thing happened at the trial. (See Page 34, Para. 63):

> "The only specific evidence on the topic was that one of them wanted to call two witnesses, the other one didn't and that they eventually called one of them; the witnesses involved and the issue were not identified. They refrained from presenting a record in any form about those different choices or their possible significance." (Parenthetically "they" did not call the one witness. That person came as a Commission witness).

115. The very statement of "they refrained" is indicative of the chill felt by Respondent in this case. Certainly, she was not going to say that the case had been bungled by another person and cause even more problems than already existed in the matter. Certainly, she was not going to tell the opponent why she did or did not want to call a particular witness during trial and thereby pass an advantage to him. Had the trials been separate these problems would not have occurred. In the Motion to Separate for Trial at Paragraph 1, this Respondent did offer to support her allegations. Further, after the trial was over during closing arguments, the Hearing Officer asked if the trials would have been handled differently if separated and whe.. Respondent answered in the affirmative and offered to tell how, the Hearing Officer declined to hear this.

116. This Respondent gave in to her Co-Respondent and his counsel and did not call Judge Munro for the purpose of getting into evidence his statement on delay (Exhibit A-31) which was excluded. Respondent had to make a choice between what was best for her and what was best for her spouse.

117. The Attorney for the Commission at the Pre-Trial Conference on the record stated he knew of no other joint trials in Indiana but on testimony corrected this and said there had been a joint trial in Indiana.

118. While some facts and dates as stated by the Hearing Officer are wrong many are not substantive:

(A) For example, the date stated at Page 38, Para. 70 should have been 1979 and not 1981;

(B) For example, at Page 7, Para. 16 which stated Judge Smock was undergoing serious health problems; he was on a vacation at that time.

(C) There are other such examples but they do not warrant taking the Court's time with corrections.

119. Some facts as stated are substantive nature; however, as for example:

(A) Page 42, Para. 84 where Smoker is stated as being "her client" ("her" refers to Respondent). Page 2, Para. 3 where it is stated that spouse represented the client. (Respondent never represented her).

(B) Page 5, Para. 11 where it is stated that the client became "increasingly disgruntled with the Respondent." It is believed that "the Respondent" does not refer to this Respondent but to the Co-Respondent.

(C) Page 17, Para. 35 talks of Respondent's ultimate purpose in contesting the will. Respondent did not contest the will. She was the attorney for all of the Plaintiffs, one of whom was her spouse.

(D) Page 16, last sentence in Para. 32 where it states that Respondent took Smoker's deposition. This is incorrect. No notice to take Smoker's deposition was given by Respondent.

(E) Page 15, Para. 30 where it is stated that a defamation counter-claim was filed against Marks and Power individually. This is incorrect. (See Exhibit Petitioner 61, Counter-claim.)

(F) Page 17, Para. 35 where it is stated that the decision to prosecute the will contest was made after an adverse determination in the guardianship. The objections to the will were filed (11-26-79) (Page 16, Para. 29), the guardianship hearing did not commence until 12-3-79 (Page 15, Para. 30).

(G) Page 19, Para. 37 where the Hearing Officer says there is no indication that anyone gave a moment's thought to the propriety of Marks and Power participation. In the Hearing Officer hearing Respondent testified that at the will contest, she objected to Marks and Power sitting as counsel when they would be witnesses but because they argued strenuously that they were counsel, they were permitted to remain in the room as trial counsel throughout the trial. (Marks and Power later began to call themselves "of counsel" a quite different approach than they used at the will contest trial).

(H) Page 22, Para. 44 refers to "Respondent's claim in the Smoker Estate." Respondent had no claim in the Smoker Estate and was not a will contestor.

There are other erroneous facts. The above serve as <u>some examples</u> only.

120. There are indications in the findings that the Hearing Officer did not fully understand the facts--that being not unusual given the complications involved and given two hearings being combined. For example:

(A) At Pages 26-28 the Hearing Officer discusses the filing of the 1977 grievance by stating that a grievance was filed against "the William J. Briggs." (Page 26, Para. 55).

(Parenthetically, since Respondent has lived in this area she has noted a colloquial use of "the William J. Briggs" meaning usually Mr. and Mrs. William J. Briggs or sometimes the William Briggs family. Because of other findings, she is not sure how "the William J. Briggs" was used.)

(B) At Page 26, Para. 56, the Hearing Officer talks about "they" and "them" in reference to the response and yet at Page 27, Para. 58 the Hearing Officer states that, "The grievance against Mr. Briggs...."

(C) At Page 28, Para. 61(b), the Hearing Officer states, "a voluminous new set of grievances were filed against Mr. Briggs and also making allegations against Respondent...."

(D) This indicates that the Hearing Officer did not understand that a grievance was filed by Marks and Power against Respondent in July of 1977 and found to be without merit in July of 1978.

121. Some of the facts found by the Hearing Officer leave a wrong impression:

(A) For example, at Page 4, Para. 8, the Hearing Officer correctly states that Judge Smock assured Smoker her farms would be handled as she desired. In the next Paragraph (see top of Page 5) the Hearing Officer states that Smoker was unhappy that a portion of her farms had been cash rented without her consultation.

(B) Taken together, the implication is that there was a refusal to abide by her wishes. See Exhibit B-26, the Cash Rent Lease, showing it was entered into while she was in the hospital and at a time when "most visitors felt she was dying." (Page 3, Para. 4 and also Exhibits A-67 and A-68, letters to tenant dated 12-4-76 and 11-29-76).

(C) After she got better, steps were taken to see that the farms were rented exactly as she desired. See Exhibit A-8, letter to farm tenant, and Exhibits B-27 and B-28, tape of telephone conversation.

122. The Hearing Officer was in error stating at Page 36 that Respondent testified voluntarily. She originally testified after being called to the stand by Attorney Hughes and over strenuous objection which was overruled. After that she had no choice but to testify. The Hearing Officer does indicate that there was an objection of record to the testimony.

123. It is respectfully submitted that the Hearing Officer did not correctly state the constitutional questions:

(A) At Page 26, Paras. D & E the question was whether the Disciplinary Proceedings as applied to her in this cause were fundamentally fair; and in this cause was Respondent subjected to cruel and unusual punishment.

(B) At Page 37, Para. 68 the finding is that the chief purpose of the subpoenas for the Disciplinary Commission was to determine why prosecutions were not sought against grievants. This is incorrect and if the undersigned gave that impression it was an incorrect one and she apologizes for same. That may have been one purpose and a peripheral one but other important purposes also were to determine what evidence was presented at the Disciplinary Commission meeting, whether a fundamentally fair presentation was made to the Commission, who were the members in attendance and whether the grievance against Respondent was considered separately from that of any other Respondent. The undersigned believes that a search of the record of the cause would reveal these purposes and she requests time for record of same to be furnished.

124. At Page 37, Para. 69 the Hearing Officer indicates that he did not require the Executive Secretary to produce his recommendations (report) on the basis of attorney work product.

In the case of Florida Bar v. Wagner, (1965), 175 S.2d 33 and McGregor v. State, (1972), Texas, 483 S.W.2d 559, the attorney was entitled to the report after the filing of the complaint. Because of the method in Indiana of reporting only cases where misconduct is found, it is unknown whether any Respondent in Indiana has seen a copy of his/her report with permission for same being granted by another Hearing Officer.

125. At Page 35, Para. 65 the Hearing Officer states that he got the impression that Wolfe's testimony would have been cumulative. Wolfe's deposition was taken on August 18, 1981, and is part of the evidence in this cause. It was in no way cumulative. It was essential. She knew Smoker well; Smoker relied on her; she was present at discussions regarding the will; she recalled that the Briggses were out of the country when the 1968 will was executed (a fact Respondent had forgotten); she recalled that Mr. Briggs had told Smoker at that time to go to another attorney to draft the will. Her illness is stated in her deposition. Also, Respondent believes

(but is not sure) that there was testimony about the illness of her husband (he died in December of 1984).

126. The great harm caused by the delay in these proceedings is evident because of Wolfe's inability to appear in person and the casualness with which her deposition testimony is as "cumulative".

127. This Respondent incorporates by reference for her Exceptions to the Constitutional Findings her Pleading filed herein on or about May 7, 1984, on Constitutional Issues.

128. Respondent hereby requests additional time to file portions of the record in this cause.

129. The Report of the Hearing Officer was handed down at the yearly commencement of the busiest time in Respondent's office--tax time. It usually commences about January 15th each year with the receipt of 1099's and with a first tax deadline of January 31st each year and a second deadline of February 28th each year. In addition, she is preparing for a trial on February 19, 1985, of an attempted murder defense. She has had to maintain her regular Court appearances as well as prepare taxes and she has an Appellate Record due on February 27th. Because of the volume of the testimony, she will be required to go to the Courthouse and search the record for the testimony.

130. Since the initial drafting of this Brief, Respondent has fallen on the ice and suffers from a disabled arm. She has been constantly on pain medication. Therefore, she has been unable to correct this Brief where it does not flow and for this she apologizes to the Court and requests its indulgence in the reading of it.

SPECIAL STATEMENT ON COSTS

131. With a sincere desire to make fairness for all lawyers practising in the State of Indiana, the undersigned points out what she perceives very unfair portion of the DR's of Indiana. That is the provision for costs as it is applied under the DR's.

132. When a defendant in a criminal case is assessed costs, he knows what they are for they are set by statute or rule. He then can make a judgment decision as to whether it is economically feasible for him to pay a fine and costs.

133. A criminal defendant is not required to pay for the investigation into his own case or for the salary of the prosecutor nor is the cost based on the amount of trial time consumed.

134. The costs in a Disciplinary Proceeding are not ascertainable. Requests for ascertainable standards and costs in this action met with resistence and a perfunctoriness. The Hearing Officer did his best to provide some type of schedule-but even he was unable to come up with definites.

135. The Executive Secretary did testify that the costs in 1977 would have been less than those assessed in 1984. Therefore, if this Respondent had been charged in July 1977 with acts occurring February through May 1977 the costs against her would have been far less.

136. Provision for costs based on the above factors (including amount of trial time) has a chilling effect on the attorney and is a violation of Amendment 1 to the U. S. Constitution which provides for redress of grievances.

137. Costs in a criminal case are extremely minor; costs in a Disciplinary case are major and can break a Respondent financially.

138. The Disciplinary costs are assessed only to a "guilty" or losing Respondent.

139. Respondent submits that she has suffered extensive pre-hearing punishment. The Hearing Officer recognizes this in his Report.

140. Respondent has tried to serve the legal profession well. She has represented her clients on a flat fee basis so that they would not be denied legal assistance. She believes that hourly charges lead to abuses, however, this is personal with her and is not intended to be criticism of attorneys who do work by the hour. She has taken cases which are unattractive to other attorneys because they do not provide big fees and she permits fees to be paid out-some as low as $5.00 per month. She does not believe the public has suffered by her practise of law. She is involved presently in civil rights litigation. What used to be a pleasant service profession for her has become displaced now by fear of the Disciplinary Commission. Discipline if imposed would chill Respondent's desire and ability to defend the unpopular cases.

Respectfully submitted,

Florence Anne Briggs
Attorney at Law

CERTIFICATE OF SERVICE

I certify that I caused to be deposited in the U. S. Mail, postage prepaid, one true and exact copy of foregoing materials, on this the 16th day of February, 1985, to the following: Mr. David Hughes, Attorney for Disciplinary Commission, 8777 Purdue Road, Suite 235, Indianapolis, Indiana 46268; Hearing Officer, Douglas B. Morton, Judge Fulton Circuit Court, Courthouse, Rochester, Indiana 46975; and to: Executive Secretary, Room 814, ISTA Building, Indianapolis, Indiana 46024.

Florence Anne Briggs
Attorney at Law

IN THE SUPREME COURT OF
INDIANA

IN THE MATTER OF
FLORENCE ANNE BRIGGS # 783 S 262

MOTION FOR BIFURCATED HEARING (FOR SEPARATE HEARING)

Florence Anne Briggs, now shows the Court as follows:

1. That she is an attorney practising law in Flora, Indiana, and has been since 1958.

2. That, in addition to being an attorney, she is also the wife of William J. Briggs.

3. That she and William J. Briggs practise law as a partnership in Flora, Indiana, but that they handle separate cases, do not represent the same persons, and while they may assist each other with research, etc., each partner accepts employment for individual cases without reliance on the other for consultation relative to the acceptance of employment.

FILED: DECEMBER 6, 1983

4. That she was acquainted with but did not represent Mary Bernice Smoker, now deceased, except for a few minor matters when William J. Briggs was not available. This has been confirmed by Mary Bernice Smoker.

5. That she is fully acquainted with the situations that have occurred in the Mary Bernice Smoker guardianship and in the Mary Bernice Smoker will-contest case.

6. That she also knows that at one time her husband, William J. Briggs, employed James Stewart of Indianapolis to represent him in these matters as co-counsel with her but that James Stewart died.

7. That she also knows that at one time her husband, William J. Biggs, employed J.T. Ives, Jr. to represent him in these matters as co-counsel with her but

that that employment terminated by mutual consent after it became known to William J. Briggs, by accident, that J.T. Ives, Jr. also represented Samuel Power, grievant.

8. That originally James Stewart was employed to represent William J. Briggs not only with reference to Disciplinary Matters against William J. Briggs but also for assistance in the Smoker guardianship matter but that as time came on for trial of this matter, James Stewart indicated that he wished to confine his representation to the Disciplinary Matters and not the guardianship trial. While Mr. Stewart did consult on the guardianship matter clear through the appeal, this left William J. Briggs without counsel for the guardianship trial.

9. That the person with the most knowledge of these matters became Florence

Anne Briggs, as an attorney, who, as an attorney, examined the orders of the Court and she, using her legal knowledge, knew the issues involved in the case which was originally filed by Marks and Powers, grievants. She had been in consultation with James Stewart and J.T. Ives, Jr., and when it became evident that (for reasons above-stated) they would not be trying the guardianship case, because of the shortness of time available and money already expended by Briggs to Ives and Stewart, and the difficulty of acquainting another attorney with the facts of the case, it was logical for Florence Anne Briggs to try the case in order to avoid delay of trial.

10. That, so far as the will contest was concerned, Florence Anne Briggs did consult, together with William J. Briggs, with the Stewart Law Firm relative to whether or not a will contest should be filed in the Smoker Estate. After consultation, it was determined that this should be done and that there was sufficient reason to do so. The undersigned incorporates by reference the allegations of her Answer to the Disciplinary Complaint setting out facts from which the jury could infer undue influence, the basis of the will contest action. William J. Briggs did not file this as an attorney, but as a private citizen and he was joined by other plaintiffs. It is submitted that a judgment decision to try a case is not a disciplinary matter,especially after

consultation with independent attorneys and it is selective prosecution to try one attorney for same, if the others similarly situated are not likewise charged.

11. The above facts show that the matters involving William J. Briggs are separate from those involving Florence Anne Briggs.

12. It is the understanding of the undersigned that the Disciplinary Commission believes that Florence Anne Briggs sponsored (Commission attorney's terminology) the position of William J. Briggs that was harmful to another person. If this is the charge against Florence Anne Briggs, then, that is a very salient reason for separate hearings. In all lawsuit, such a charge could be made of each attorney. It may be that the role of attorneys is at

issue here and whether an attorney can represent, as an advocate, a case which harms someone else. The nature of a lawsuit is that someone is asserting a position against another person and thereby it might be stated that someone is always harmed. If this be true then it is submitted that this case of Florence Anne Briggs may have grave consequences for other attorneys practising in Indiana. Will they be permitted to take a position opposite to that of some(sic) else knowing that in many lawsuits there are no winners but only two sides that have been harmed?

13. To the best knowledge of Florence Anne Briggs the only grievances filed against her in 25 years of practise have to do with Smoker matters.

14. The fact that these are separate Complaints and should be heard separately is buttressed by the fact that the first (Marks/Power) grievance against Florence Anne Briggs (filed July 1977) was found to be without merit and no complaint was filed (in the Smoker matter) but that later the Disciplinary Commission retroactively filed charges against Florence Anne Briggs that had prior to this time been found to be without merit. This being so, any hearing officer wouldhave a difficult time separating the issues in these matters and it would not be fair to and would be prejudicial to William J. Briggs to have a finding aginst him because of issues concerning FlorenceAnne Briggs and it would not be fair and would be prejudicial to Florence Anne Briggs to have a finding made against her on the basis of issues relating to William J. Briggs.

15. It is noted that in denying the request for a separate hearing officer, the Supreme Court seemed interested in judicial economy. It is submitted that this cannot take precedence over the rights of the party. If this were true, jury trials would be denied in many cases. Judicial economy cannot abrogate due process rights and other rights to the prejudice of the party.

16. It may be presumed that the issue of a husband and wife practising law together may present a novel question to the Court and certainly in such a matter, there would be a tendency for the hearing officer to be unable to separate "pillow talk" from legal judgments. This presents a great issue of prejudice to both Willaim J. Briggs and Florence Anne Briggs. If these cases did not involve husband and wife, then it's

believed that there would be no question but what they would be tried separately.

17. It cannot be overlooked that there may be evidence on behalf of William J. Briggs which might be prejudicial to Florence Anne Briggs and there might be evidence on behalf of Florence Anne Briggs which would be prejudicial to William J. Briggs.

18. The witnesses for William J. Briggs will be somewhat different from the witnesses for Florence Anne Briggs. While there may be some duplication, since the issues are different, the witnesses will be different in each case.

19. It cannot be overlooked that William J. Briggs may with to rely on Florence Anne Briggs for assistance at his hearing and that Florence Anne Briggs may wish to rely on William J. Briggs for assistance at her hearing.

20. The undersigned believes it coercive to both parties to have insistence that these cases be tried together. An example is that a settlement has been attempted which has been characterized as a "package" settlement and an indiciation has been made to Florence Anne Briggs that her case cannot be settled without that of William J. Briggs and that the case of William J. Briggs cannot be settled without that of Florence Anne Briggs being settled. William J. Briggs and Florence Anne Briggs have never insisted on a "package" deal since they have from the outsetof this matter been concerned that they would be coerced into a "package" settlement. in support of this coercive allegation, it is further stated that it has been suggested to Florence Anne Briggs, by the attorney for the Commission, that she might wish to change her name from "Briggs." The

undersigned will continue to resist such coercive tatics (sic). The attorney for the Commission has indicated that these cases are between the Commission and the firm of Briggs and Briggs, theeby verifying the fact that the Commission considers these cases a package and sight has been lost of the fact there there are two separate attorneys and their separate practises which are involved.

21. It is further called to the attention of the Court that a woman as an attorney and as an individual is a member of a minority and is a member of a "suspect classification." She will resist any attempts to abrogate her constitutional rights based on gender. More particularly are these rights and defenses set out in her answer previously filed and incorporated herein.

22. If the two cases were tried jointly, this will cause a greater length of unbroken or continuous trial time. The

attorney for the Commission has indicated that if the hearing is long, then he would ask that it not be tried continuously but at broken periods so that he can continue on with his regular law practise. Therefore, if the case for William J. Briggs were tried separately from that of Florence Anne Briggs, then this would have the effect of shortening continuous time needed for trial. It is believed by the undersigned that it would be very prejudicial to have the hearing be in any other format than a continuous format once the hearing has commenced. In other words, the hearing for William j. Briggs, should be continuous when it starts and the hearing for Florence Anne Briggs should be continuous when it starts.

23. One of the charges against Florence Anne Briggs is that she acted as an attorney in a case where a member of her law firm was an attorney. Again ,she is being

selectively persecuted since some of the grievants similarly situated are not similarly charged. It is doubted that any other legal firm in the State of Indiana has borne the brunt of the Disciplinary Commission's wrath quite so strongly as that of Briggs and Briggs, for such an extended period of time, in a situation where the grievants themselves have culpability without charge.

WHEREFORE, Florence Anne Briggs moves the Court to separate her hearing from that of her husband, William J.Briggs and she further requests that all matters relating to the two hearings be bifurcated and separated in all respects.

I, Florence Anne Briggs, affirm under the penalties for perjury that the above facts are true.

ss/ Florence Anne Briggs

Florence Anne Briggs
Attorney at Law
P.O. Box 2, Flora, IN 46929
Phone: 219-967-3631/3643

certificate of service omitted

IN THE SUPREME COURT

OF THE

STATE OF INDIANA

IN THE MATTER OF

FLORENCE ANNE BRIGGS CAUSE NO. 783 S 262

MOTION TO DISMISS SUPPLEMENTING SPECIAL DEFENSE #3 AT PAGE 23 OF ANSWER HERETOFORE FILED

Florence Anne Briggs Moves the Court to Dismiss the following charges against her which charges were made in the Verified Complaint filed against her on July 19, 1983:

(1) Charge in Paragraph 23 of said Complaint that she served as counsel in the Conservatorship and Will contest matters after she learned or it was obvious that she or a lawyer in her firm ought to be called as a witness,

> Reason for Dismissal: No grievance was filed against her on this charge and under A.D. 23 (10) (d) of the Disciplinary Commission and

Filed April 4, 1984

Proceedings, it states:

> "In the event that the executive secretary or the commission should consider any charges of misconduct against an attorney not contained in the grievance, the executive secretary shall notify the attorney of the additional charges under consideration and the attorney shall have the opportunity to make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification."

No notice as required by the above rule was given to Florence Anne Briggs as to the consideration of additional charges and therefore the Disciplinary Commission and/or its Executive Secretary violated Rule A.D. 23 (10) (d).

(2) Charges in Paragraph 24 of said Verified Complaint where it states that she failed to communicate a Will contest settlement offer to the attorney of record.

Reason for Dismissal: She was not put on notice and no grievance was filed alleging the above. The grievance did allege that she "endeavored to communicate with residuary devisees" but does not allege that she failed to communicate with the attorney of record.

Reason for Dismissal: Violation by the Commission and/or Executive Secretary of A.D. Rule 23 (10)(d) cited above in Paragraph 1.

(3) Charges in Paragraph 25 of Verified Complaint wherein it is charged that Florence Anne Briggs unreasonably delayed the termination of the Conservatorship and thereby allowed her personal interests to interfere with the exercise of her professional judgment and charge in Paragraph 27 of said Complaint "opposing and delaying termination of the Conservatorship for personal reasons."

Reason for Dismissal: Violation by the Commission and/or Executive Secretary thereof of A.D. Rule 23(1)(d), cited above in Paragraph #1.

Florence Anne Briggs was not given notice in any grievance filed that she was being charged with this misconduct nor was any notice given to her that any consideration was being given to additional charges against her which are reflected in said Paragraph #25.

(4) Charge in Paragraph 27 of the Verified Complaint of personal communicating directly with opposing party in an effort to settle <u>against the known advice of opposing counsel</u>.

> Reason for Dismissal: Violation by Commission and/or Executive Secretary of A.D. 23 (10)(d) cited above in Paragraph #1.

No notice was given to Florence Anne Briggs as to the consideration of additional charges and in particular the portion underlined above "against the known advice of opposing counsel."

<u>SS/Florence Anne Briggs</u>
Florence Anne Briggs

(Memorandum Certificate of Service not attached.)

RELEVANT PARAGRAPHS OF THE COMPLAINT
FILED AGAINST FLORENCE ANNE BRIGGS BY
THE INDIANA DISCIPLINARY COMMISSION
ON JULY 19, 1983, IN CAUSE # 783-S-262

(1) During the mid-1960's the Respondent's husband and law partner....

(16)...In this trial the Respondent appeared and served as counsel for the conservator, her husband and law partner....

(20) ...the Respondent appeared and served as counsel for the objector, her husband and law partner....

(27) The Respondent's conduct in this entire matter, as law partner, spouse, assistant and legal counsel....

I certify that the above is a true and exact copy of portions of the Complaint filed as above stated.

Florence Anne Briggs

STATE OF INDIANA)
) SS:
COUNTY OF CARROLL)

Subscribed and Sworn to before me this 8th day of June, 1987.

Teresa A. Rush
Notary Public
Residence: Carroll Co, IN

My Com. Expires:
September 14, 1988

Appendix I

IN THE SUPREME COURT OF THE
STATE OF INDIANA

IN THE MATTER OF
FLORENCE ANNE BRIGGS #783 S 262

PETITION FOR CHANGE OF
HEARING OFFICER

Florence Anne Briggs, for and on behalf of herself, now shows the Court that she has received notification that Hon. Douglas Morton, Judge, Fulton Circuit Court, has been appointed as a hearing officer for the Complaint filed against her in the above cause of action. She further shows the Court that her husband, William J. Briggs, is also the subject of a Complaint having been filed against him in October of 1978 and amended in July of 1983. She now states to the Court that

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1983

she feels it would not be in her best interests that the same hearing officer hear her case as will be hearing the case for William J. Briggs. In support of this, she calls the attention of the Court to various motions placed of record in her Answer to the Complaint filed on or about August 19, 1983.

WHEREFORE, the undersigned now moves the Court to appoint another hearing officer to hear any charges against her for the reason that it would be in her best interests to have such action taken by the Court. The undersigned says under the penalties for perjury that the above facts are true.

ss/ Florence Anne Briggs
Florence Anne Briggs
Attorney at Law
P.O. Box 2, Flora, IN 46929

(Certificate of Service omitted)

STATE OF INDIANA)
) SS:
COUNTY OF CARROLL)

IN THE CARROLL CIRCUIT COURT
1980 TERM

IN RE THE CONSERVATORSHIP OF MARY BERNICE SMOKER

NO. G-76-14

Mary G. Rice, the undersigned, hereby states that she is the Court Reporter of the Carroll Circuit Court of Indiana and that she has in her possession and under her control tapes of a hearing on May 11, 1977, in the above cause of action. The following is an excerpt from a statement made by the Honorable Robert F. Munro, Special Judge, prior to presentation of evidence at that hearing:

(Exhibit A-31
Not Admitted)

"...I would be inclined to say that there would be no great harm in getting Dr., I think it would probably be a good idea to get Dr. Wagoner's testimony, and if it, if it's only going to give us about two weeks delay, in view of the fact that I've managed to cause about three months delay so far, I don't think the extra two weeks would do that much damage...."

The undersigned states that she has listened to said tape and hereby certifies that she has transcribed the above and that the above is a true and exact excerpt from said hearing.

ss/ Mary G. Rice
MARY G. Rice, Reporter
Carroll Circuit Court
74th Judicial Circuit
of Indiana
November 17, 1980

SEAL

Supreme Court, U.S.
FILED
JUL 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1977 (3)

FLORENCE ANNE BRIGGS,

Petitioner,

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT INDIANA SUPREME COURT DISCIPLINARY COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sheldon A. Breskow
David B. Hughes
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Disciplinary Commission
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Indianapolis, Indiana 46204

Attorneys for Respondent
Indiana Supreme Court
Disciplinary Commission

Central Publishing Company, Inc., Indianapolis, IN 46206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1977

FLORENCE ANNE BRIGGS,

Petitioner,

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

I.

OPINION BELOW

The decision and opinion giving rise to Petitioner's application for Writ of Certiorari were made and entered by the Supreme Court of Indiana on January 13, 1987. Said decision and opinion appear at 502 N.E.2d 890, entitled *In the Matter of Florence Anne Briggs*. The decision and opinion are set forth in Petitioner's Appendix at App. B1-31. The effect of the subject decision and opinion was to suspend Petitioner from the practice of law in the State of Indiana for one (1) year.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

III.

QUESTIONS PRESENTED

The Respondent will respond below in its Argument only to those questions that are relevant in the petition. The questions the Commission do not address were found to be without merit on their faces.

IV.

CONSTITUTIONAL PROVISION AND STATE RULE INVOLVED

The Petitioner has fairly summarized the constitutional provisions and state rules she claims have application to the questions presented except that two sections of Indiana Admission and Discipline Rule 23 were set forth incorrectly in her brief. The correct versions of each section are as follows:

Rule 23, Section 10(d)

> In conducting an investigation of any grievance, or in considering the same, the Executive Secretary or the Commission shall not be limited to an investigation or consideration of only matters set forth in the grievance, but shall be permitted to inquire into the professional conduct of the attorney generally. In the event that the Executive Secretary or the Commission should consider any charges of misconduct against an attorney not contained in the grievance, the Executive Secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional charges under consideration within twenty (20) days after the receipt of such notification.

Any additional charges of misconduct against an attorney, after such notice has been given by the Executive Secretary and the attorney has had an opportunity to reply thereto, may be the subject of a count of any complaint filed against the attorney pursuant to Sections 11 and 12 of this rule.

Rule 23, Section 15(a)

The Respondent or Commission shall have thirty (30) days after the filing of the hearing officer's finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty (30) days of the finding and recommendation of the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

V.

STATEMENT OF THE CASE

On July 19, 1983 a Verified Complaint For Disciplinary Action was filed against the Petitioner by Respondent. A Hearing Officer was appointed by the Supreme Court of Indiana and the cause was heard over a six-week period beginning July 12, 1984 and ending on August 30, 1984. Both parties then waived the thirty (30) day reporting requirement for the Hearing Officer's Report. The Hearing Officer filed his report to the Supreme Court of Indiana on January 18, 1985, pursuant to Admission and Discipline Rule 23, Section 14(f). In said report, the Hearing Officer found that Petitioner had committed acts of misconduct and recommended that Petitioner be publicly reprimanded.

A review by the Supreme Court of Indiana of the findings and conclusions contained in the Hearing Officer's Report is provided for in Admission and Discipline Rule 23, Section 15(a). Both Petitioner and the Disciplinary Commission petitioned for a review of certain factual findings of the Hearing Officer on February 25, 1985. In addition, the Disciplinary Commission objected to the leniency of the Hearing Officer's recommended

sanctions. On review, the Supreme Court of Indiana rejected the Hearing Officer's recommendation as to the appropriate sanctions and determined that Petitioner's conduct warranted suspension rather than a public reprimand. Suspension was ordered in the Court's opinion entered on January 13, 1987.

On January 28, 1987, Petitioner filed a "Petition by New Counsel for a Temporary Stay of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice". This petition was denied by the Supreme Court of Indiana on February 12, 1987. On February 2, 1987, Petitioner filed a "Petition by New Counsel for a Modification of the Court's Decision Entered January 13, 1987, Suspending Respondents from Practice". This petition was denied by the Supreme Court of Indiana on February 25, 1987.

VI.

REASONS FOR DENYING THE WRIT

Petitioner's first major argument is that under the rules of criminal procedure joinder of her cause with her attorney husband's cause at trial prejudiced her defense and violated the due process clause of the Fifth and Fourteenth Amendments of the *Constitution of the United States*. Petitioner's argument has no merit because the rules of Criminal Procedure do not apply to attorney disciplinary proceedings. Disciplinary proceedings are not criminal prosecutions. *In re Ruffalo*, 390 U.S. 544, 551 (1968). *In re Kessler*, 272 Ind. 161, 397 N.E.2d 574, 576 (1979). In addition, it is apparent that the joinder of trials was merely for convenience because both causes centered around a common fact pattern. Petitioner also argues that somehow her husband's alleged improper conduct "rubbed off" on her and ultimately resulted in her being sanctioned for conduct that was not her own. This allegation is purely speculative. Petitioner simply makes a claim, but in no way does she show that joinder of trials with her husband prejudiced her cause in any way. Therefore, it is respectfully submitted that the Supreme Court of Indiana's decision that joinder of trials did not preju-

dice Petitioner's defense was correct and that joinder did not violate the due process requirements of the Fifth and Fourteenth Amendments to the *Constitution of the United States*.

A second major argument which Petitioner advances is that the only reasons she was disciplined is because she is an attorney who is married to another attorney who was disciplined. This argument is untenable. As the Hearing Officer and the Supreme Court of Indiana found, the Petitioner assisted her husband in a concerted effort to intentionally delay the termination of a conservatorship which they acknowledged should be terminated. Petitioner's App. at B-26. The crux of Petitioner's argument is that because the Supreme Court of Indiana did not find in her favor, she was denied due process. An adverse decision below does not in any way indicate that Petitioner's right to due process was denied. Therefore it is respectfully submitted that Petitioner has failed to present a question that requires this Court's review based upon the facts of this case.

Petitioner also argues in her petition that her right to due process was violated due to the length of time it took to reach a final judgment. First, it must be noted that no statute of limitations was violated in disciplining Petitioner. Any incidental delays that did occur can be attributed to either the workload of the Disciplinary Commission or directly to petitioner and her attorney husband. In addition, as the Hearing officer in this matter noted, Petitioner was not prejudiced by the death of what she refers to as a "key" witness before her trial. Petitioner's App. at C-89. Preservation of evidence in this case was quite easy and Petitioner was put on notice early of this action. Petitioner's App. at C-83. Therefore, she had ample opportunity to recall and preserve as much as necessary. Therefore, it is respectfully submitted that Petitioner has failed to demonstrate that her Fifth and Fourteenth Amendment rights to due process under the *Constitution of the United States* have been violated.

Finally, petitioner argues that Indiana's procedure whereby

the Supreme Court of Indiana acts as prosecutor and finder of fact is inconsistent with the due process clause of the *Constitution of the United States*. This issue has been previously decided by this Court. The combining of prosecutorial and adjudicative functions in a single agency without more does not violate due process. *Withrow v. Larkin*, 421 U.S. 35 (1975).

Therefore, it is respectfully submitted that the Petitioner has failed to present a question that requires this Court's review based on the facts of this case.

CONCLUSION

The decision below is correct. For the foregoing reasons, it is respectfully submitted that this Petition For Writ of Certiorari should be denied.

Respectfully submitted,

/S/ SHELDON A. BRESKOW
SHELDON A. BRESKOW

/S/ DAVID B. HUGHES
DAVID B. HUGHES

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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term
1986

No. 86-1977

FLORENCE ANNE BRIGGS,

Petitioner

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT

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EDITOR'S NOTE

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Respondent's Brief in Opposition to the Petition for Writ of Certiorari was received by the Petitioner on or about July 22, 1987.

Florence Anne Briggs, for her Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari, says:

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For purposes of this Reply, citations to the Petition for Writ of Certiorari filed by Petitioner are designated as "P/C" followed by the page number, e.g. "P/C 22;" citations to the Appendix are designated as P/C/Ap" followed by the page number, e.g. "P/C/Ap 22;" citations to Respondent's Brief in Opposition are designated as "R/B" followed by the page number, e.g. "R/B 22."

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In answering the Petition for Writ, Respondent has indulged in such homilies as, "(t)his allegation is purely speculative" (R/B 4); (t)his argument is untenable," (R/B 2); "(t)he questions...were ...without merit," (R/B 2). These statements are conclusions and do not address the issues.

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R/B 2 states "...two sections of Indiana Admission and Discipline Rule 23 were set forth incorrectly in her brief." Respondent then quotes Rule 23 (10)(d) and (15)(a) in full.

PETITIONER'S ANSWER: Only relevant parts of the above rules were set forth at P/C 4, Paragraph (f) for Sec. 10(d) and P/C 5, Paragraph (j) for Sec. 15(a). However, Rule 23 (10)(d) is set out IN FULL in P/C/Ap A 8, and, again, the relevant part of Rule 23 (15)(a) is set out in P/C/Ap A 10. The 30-day reporting requirement of Rule 23, (15)(a) is not relevant to the Petition for Writ and was waived by F.A. Briggs (P/C/Ap C 84 at (j); see also, R/B 3 under "Statement of the Case."

R/B 4, four lines from the bottom of the page incorrectly states,"...in no way does she show that joinder of trials with her husband prejudiced her cause in any way."

PETITIONER'S ANSWER: P/C 17 commences a recitation of facts setting out how joinder

of trials prejudiced wife/attorney, examples:

(1) Husband was charged with writing an improper will, being co-owner of a joint C.D. and harassment. Wife was not so charged P/C 17.

(2) Five charges against husband were not charged against wife. P/C 17.

(3) The bulk of husband's case involved transactions in which wife was not involved. P/C 18.

(4) Wife refrained from calling a witness because husband and his attorney objected to her doing so and having him as a witness in husband's case. P/C 22.

(5) The Hearing Officer used a court finding against husband to find against wife. P/C 24.

(6) For 8 pages of his report on wife, the Hearing Officer discusses incidents pertaining only to husband, a fact which he acknowled-

ges. P/C 25.

(7) Additional facts of improper co-mingling are set out at P/C 26.

(8) An in-chambers conference at which wife was excluded but in which husband's attorney was included is set out at P/C 26,last paragraph.

(9) The reportof the Hearing Officer on wife refers mostly to husband. P/C 31.

(10) The judgment of the Indiana Supreme Court likewise co-mingles the cases in utilizing facts against husband in which wife had no involvement as a basis for finding against wife. P/C 33.

(11) The very fact that F.A.Briggs was disciplined for giving prudent legal advice to her client-husband amply demonstrates improper joinder of the cases. See Discussion commencing at P/C 27.

R/B 5 about 1/3 down from the top of the page, says that wife assisted her husband to delay the termination of a conservatorship which they (emphasis ours) acknowledged should be terminated.

PETITIONER'S ANSWER: This demonstrates clearly prejudice to wife in being joined with husband for trial. F.A.Briggs (wife) never acknowledged that the conservatorship should be terminated without hearing thereon under the law in effect in Indiana by case law at that time. In fact, also, she advised husband against filing the Petition to Terminate and thought that a hearing should be held on the Petition to Discharge filed by ward's attorneys. The hearing Officer acknowledges this. P/C/Ap C 24. Her reasons for this advice are set forth at P/C 27,28. The very statement made at R/B 5, supra, is addressed at P/C 34 as follows:

"Evidence of co-mingling of the facts and issues is illustrated by the judgment that "they" (spouses) believed the guardianship should be terminated. (App.B-26, infra). This is incorrect since the Hearing Officer's facts recognized that this was not the decision of F.A. Briggs, but of W.J. Briggs since she counseled against the filing of W.J. Briggs'Petition to Terminate.(App. C-24, infra)."

R/B 5, states without citation to the P/C or its Appendix that the crux of Petitioner's Argument is that because the Supreme Court of Indiana did not find in her favor, she was denied due process.

PETITIONER'S ANSWER: A careful reading of the Petition for Writ of Certiorari does not support the statement at R/B 5. The P/C issues are set forth at P/C i-iii and due process challenges are directed only to those issues as follows:

(A) Requiring joinder of trial because of marital relationship . P/C i.

(B) Disciplining an attorney by infusing the acts of another on her because of marital relationship. P/C i.

(C) Presuming legal advice to be tainted because given to a spouse-client. P/C i.

(D) Disciplinary Commission disregarding its own rules and applying them in an unconstitutional fashion. P/C ii and iii.

(E) The incestuous and financially rewarding disciplinary process. P/C iii.

No where does the Petitioner challenge due process simply because of a finding against her.

At R/B 5, the Respondent, again without citation to either the Petition or its Appendix states that the Petitioner argues her right to due process was violated due to the length of time it took to reach final judgment. PETITIONER'S ANSWER: A careful reading of the P/C does not reflect this as a due process challenge. The time issue is involved only because stale charges were brought against F.A. Briggs after her key witnesses who could have testified in her behalf were deceased. Discussion of this commences at P/C 35. There

is no allegation in P/C of delay after the Complaint was filed as Respondent herein implies by saying that due process was violated by the length of time it took to reach final judgment as being one of Petitioner's allegations (R/B 5).

R/B 5 states that preservation of evidence in this case was quite easy.

PETITIONER'S ANSWER: The witnesses who were necessary to F.A. Briggs' defense were dead before the Complaint was filed...therefore, there could be no preservation of evidence/ testimony. See P/C 36 et seq. In one instance, the delay charged allegedly occurred February-May 1977; no "delay" grievance was filed; Verified Complaint was filed July 1983; witness had died March 1981.

Also, at least one witness was lost to Petitioner by the actions of the Executive Secretary of the Disciplinary Commission. P/C 47. The charge against F.A.Briggs related to November

1980 in time. Grievance was filed May 1981; witness died June 1983; Verified Complaint was filed July 1983. July 1982 had proper notification been made to F.A. Briggs, she would have appeared before the Disciplinary Commission with her witness. P/C 39.

R/B 5: "Petitioner also argues...that her right to due process was violated due to the length of time it took to reach a final judgment."
R/B 5: states that incidental delays in part can be attributed "directly to the petitioner and and her attorney husband."
PETITIONER'S ANSWER: The Respondent has confused the issues raised in # 86-1976 (W.J. Briggs, Petitioner) which assert a speedy trial-delay issue after the filing of the Verified Complaint. F.A. Briggs does not raise a speedy trial-delay issue after the filing of the Complaint. This Petitioner requested only one 3-month delay in trial--from an April to July trial date.

R/B 5 (last line) "...petitioner argues that Indiana's procedure whereby the Supreme Court of Indiana acts as prosecutor andfinder of fact is inconsistent with the due process clause...."

PETITIONER'S ANSWER: Petitioner addresses cumulative due process violations indulged in by the Disciplinary Commission as evincing a "deliberate indifference to the rights of undersigned, (P/C 41)and also the pecuniary interest that the Disciplinary Commission as an arm of the Indiana Supreme Court derives from the assessment of misconduct against an attorney. (P/C 54. Therefore, something more than the combining of functions is addressed by the Petitioner.

Wherefore, the undersigned petitions the Court to grant her relief as requested in her Petition for Writ of Certiorari.

Respectfully submitted,

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